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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

JESS MCDONALD,

*Petitioner,*

vs.

MARCEL YOUAKIM, *et al.*,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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April 16, 1996

## QUESTION PRESENTED

Whether under the Due Process Clause of the Fourteenth Amendment, a State legislature may amend State law to alter or eliminate statutory social welfare benefits on a class-wide basis without first providing current recipients with individual due process determinations on their eligibility for different benefits they have not previously received.

## LIST OF PARTIES

The parties to the proceedings below were petitioner Jess McDonald, Director of the Illinois Department of Children and Family Services ("DCFS" or the "Department"), sued in his official capacity. Respondents included Marcel Youakim and Linda Youakim, individually, and as foster parents, and Tim Robertson, and all others similarly situated.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Jess McDonald, Director of the Illinois Department of Children and Family Services ("DCFS" or the "Department"), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on December 6, 1995.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 71 F.3d 1274 and is reprinted in the appendix hereto, infra p. 1a.

The opinion of the United States District Court for the Northern District of Illinois (Nordberg, J.) is unreported and is reprinted in the appendix hereto, infra p. 47a. The injunction entered by the district court on June 30, 1995, is unreported and is reprinted in the appendix hereto, infra p. 88a.

## JURISDICTION

Respondents initiated this proceeding pursuant to Civil Rule 18 of the United States District Court for the Northern District of Illinois seeking an order adjudicating petitioner in civil contempt of the 1976 Judgment Order in Youakim v. Miller, No. 73 C 635 (N.D. Ill. Aug. 24, 1976) (the "Judgment Order") (reprinted in the appendix hereto at p. 90a), because of the enactment by the Illinois General Assembly of a new State law eliminating foster care payments to unlicensed foster homes. See Youakim v. Miller, 431 F. Supp. 40 (N.D. Ill. 1976) (memorandum opinion and order preceding Judgment Order), aff'd, 562 F.2d 483 (7th Cir. 1977), aff'd, 440 U.S. 125 (1979). Respondents also sought declaratory and injunctive relief, alleging that the new State law violated Title IV-E of the Social Security Act ("Title IV-E"), 42 U.S.C. §§ 670-76, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1343, 2201, and 2202. The district court's jurisdiction was also based on Paragraph 12 of the Judgment Order, which provides for continuing jurisdiction, as well as the district court's

inherent power to enforce its orders under Civil Rule 18 of the Northern District of Illinois. The district court conducted an evidentiary hearing on June 15 and 16, 1995, and entered a preliminary injunction (the "injunction") on June 30, 1995, enjoining the operation of the new law as it applied to all current unlicensed foster homes caring for related children in State custody. (App. 88a.)

On June 30, 1995, petitioner filed a timely notice of appeal from the injunction order. Appellate jurisdiction was based on 28 U.S.C. § 1292(a)(1). On December 6, 1995, the Seventh Circuit affirmed the district court's injunction as modified. (App. 1a.) Petitioner filed a petition for rehearing with suggestion for rehearing en banc on December 15, 1995. On January 17, 1996, the Seventh Circuit denied that petition. (App. 45a.)

This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

AMENDMENT XIV.

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This case presents a critical and timely issue on the limits of the Due Process Clause when a State legislature acts to eliminate a State-created social welfare program. The Seventh Circuit below upheld an injunction preventing Illinois from implementing a statute eliminating State-created and State-funded foster care payments for unlicensed foster homes. Contrary to this Court's long-standing precedent, the Seventh Circuit concluded that the State must continue these foster care payments, even though the legislature had eliminated the program, until Illinois provided thousands of current unlicensed foster homes with individual determinations on whether they are eligible for payments under a separate foster care program for licensed homes. If left to stand, the Seventh Circuit ruling vastly broadens the meaning of the Due Process Clause and unduly intrudes upon the ability of State legislatures to alter or reform their own welfare programs.

The injunction was directed against Illinois' Public Act 89-21 ("P.A. 89-21"). P.A. 89-21 enacts the Home of Relative ("HMR") Reform Plan, a major legislative initiative to revise the regulation and use of relatives as foster parents for children

in DCFS custody. The statute, among other things, eliminated the State's program providing monthly foster care payments to unlicensed relative foster homes. (App. 9a-10a.) Prior to the passage of P.A. 89-21, Illinois was one of only two states in the nation that provided foster care payments to unlicensed foster homes at the same monthly payment rate as licensed foster homes. (App. 57a-58a.) These foster care payments were entirely State-created and State-funded, as the federal foster care program under Title IV-E provides federal funds only for licensed foster care. See 42 U.S.C. § 672(c). As noted by the district court, as of April 30, 1995, there were over 8,000 unlicensed relative homes receiving full foster care payments from Illinois.[1] (App. 55a-56a.) Under the terms of P.A. 89-21, as of July 1, 1995, foster care payments to unlicensed homes were eliminated, although relative caregivers could apply to

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[1] Title IV-E also provides federal funds for foster homes that are "approved." 42 U.S.C. § 672(c). Prior to the passage of P.A. 89-21, Illinois operated an "approval" program for relative foster homes. (App. 6a-7a.) This "approval" program was also eliminated under the HMR Reform, although a transition process was provided for "approved" relative homes to obtain licenses prior to a reduction in monthly payments. (App. 11a-12a.) As of April 30, 1995, there were approximately 5,000 "approved" relative foster homes. (App. 56a.) The district court held that the transition process for these approved homes was insufficient, and violated the terms of Title IV-E and the 1976 Judgment Order. The injunction imposed a new transition process for those "approved homes," and was upheld by the Seventh Circuit. (App. 22a-26a.) This petition does not challenge the Seventh Circuit's decision under Title IV-E and the Judgment Order with respect to these 5,000 "approved" homes.

become licensed and could receive licensed foster care payments if they met the applicable licensing standards.[2]

Respondents are relatives operating relative foster homes, and the children placed there by DCFS. Respondents challenged the enactment of P.A. 89-21, and filed a motion asserting that the new statute rendered petitioner in contempt of the 1976 Judgment Order in this action. The Judgment Order was based solely on respondents' federal statutory claims under Title IV-E and enjoined DCFS from denying relatives caring for children in State custody the same opportunity as unrelated caregivers to become qualified under State law as "foster family homes" and receive federal Title IV-E foster care payments. (App. 4a-5a, 90a.) See Miller v. Youakim, 440 U.S. 125, 129 (1979). Respondents also alleged that P.A. 89-21 violated Title IV-E and the Due Process Clause of the Fourteenth Amendment. (App. 29a, 74a.)

Specifically, respondents challenged only the implementation of P.A. 89-21 as applied to current unlicensed relative foster homes. Respondents' Due Process claims alleged that Illinois could not eliminate foster care payments to any existing unlicensed relative homes without first making thousands of individual determinations as to whether these unlicensed homes were eligible for payments as licensed foster homes -- regardless

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[2] After July 1, unlicensed relative homes began receiving monthly "standard of need" payments that were lower than the monthly licensed foster care payments. (App. 60a-61a.)

of whether the relatives had ever applied for payments under the licensed foster care program.

On June 30, 1995, the day before P.A. 89-21 took effect, the district court held that implementation of P.A. 89-21 would violate the Judgment Order, Title IV-E and the Due Process Clause. (App. 80a-81a, 88a.) The district court therefore enjoined Illinois from "reducing foster care payments to all relative foster children currently receiving foster care payments until defendants give those children and their relative foster parents an opportunity to have an[] application for licensure determined on its merits." (App. 88a-89a.)

Petitioner filed a timely notice of appeal from the district court's June 30 order and moved the Seventh Circuit for expedited appeal and a stay of the injunction pending appeal. On July 10 and 12, 1995, respectively, the Seventh Circuit granted both of petitioner's motions.[3]

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[3] The Seventh Circuit vacated the stay of the injunction on September 28, 1995, the day after oral argument. However, on October 10, 1995, the court granted petitioner's emergency motion for reconsideration and reinstated the stay pending disposition of the appeal. (App. 3a n.1.) On December 6, 1995, the Seventh Circuit vacated the stay in its opinion affirming the injunction as modified. On December 21, 1995, the court granted petitioner's motion to reinstate the stay pending the petition for rehearing with suggestion for rehearing en banc. The stay was vacated again by the Seventh Circuit on January 17, 1996, when the petition for rehearing was denied. Petitioner then submitted an application to Circuit Justice Stevens for a stay pending the submission of this petition for certiorari.

(continued...)

On December 6, 1995, the Seventh Circuit affirmed as modified the district court's opinion and order. (App. 1a, 44a.) The Seventh Circuit first considered respondents' claims under the 1976 Judgment Order and Title IV-E, which the court noted prohibits the State from denying federal foster care payments to relative homes "otherwise eligible for such payments." (App. 4a-5a, 18a-20a.) The court held that the 5,000 existing relative caregivers who had been "approved" by DCFS under Title IV-E, but were not licensed, were "otherwise eligible" under the federal program, and thus, the State could not deny Title IV-E foster care payments to these caregivers without first making a determination on licensing applications submitted by these "approved" relative caregivers.[4] (App. 25a-26a.)

The Seventh Circuit, however, overturned the district court's application of the Judgment Order and federal statute to the 8,000 unlicensed and unapproved homes, noting that "[t]he fact that Illinois chose for a period of years to pay foster care benefits to children in [unlicensed and unapproved] homes does nothing to change the requirements of federal law. The State's decision to eliminate payments that were never required by the [Social Security] Act could not itself violate the Act." (App.

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[3](...continued)
On January 26, 1996, Justice O'Connor granted a temporary stay, but ultimately denied petitioner's application for a stay on February 5, 1996.

[4] As stated above, petitioner does not seek review of this portion of the Seventh Circuit opinion.

28a.) Thus, the Seventh Circuit recognized that the foster care payments to these unlicensed and uapproved homes were provided solely under Illinois law and were eliminated as of July 1, 1995, by legislative enactment. (App. 28a-29a.)

The Seventh Circuit's recognition that Illinois was free to "eliminate payments that were never required by" federal law should have conclusively decided respondents' Due Process claims. (App. 28a.) P.A. 89-21 was clearly a legislative enactment eliminating an entire class of State-created foster care payments, and under this Court's precedent, "'the legislative determination provides all the process that is due.'" Atkins v. Parker, 472 U.S. 115, 129-30 (1985) (quoting Logan v. Zimmerman Brush Co., 455 U.S. 427, 432-33 (1982)). However, the Seventh Circuit erroneously held that P.A. 89-21 violated the Due Process Clause for all current relative caregivers, including the 8,000 unlicensed and unapproved caregivers. (App. 29a-40a.) The court held that Illinois was constitutionally required to continue to pay State foster care payments to all of these relatives until the State provided "a DCFS determination on the licensing question." (App. 37a.) Thus, Illinois was required to provide thousands of individualized due process determinations to all current recipients of foster care payments, including recipients who had never been licensed or approved, or had even submitted an application for licensure, before P.A. 89-21 could be implemented.

On December 15, 1995, petitioner filed a timely petition for rehearing with suggestion for rehearing en banc challenging this decision, which the Seventh Circuit denied on January 17, 1996. (App. 45a-46a.)

## REASONS FOR GRANTING THE WRIT

The Seventh Circuit opinion directly conflicts with the well-established limits on the reach of the Due Process Clause and eviscerates the sovereign right of a State to legislatively alter or terminate its own social welfare programs. This Court has long held that property interests are "created and defined by statutory terms," Board of Regents v. Roth, 408 U.S. 564, 578 (1972), and when the legislature acts to change those statutory terms, "'the legislative determination provides all the process that is due.'" Atkins, 472 U.S. at 129-30 (quoting Logan, 455 U.S. at 432-33); see also Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915). The Due Process Clause simply does not provide any basis for the intrusion of the federal judiciary in second-guessing the public policy choices made by State legislatures in amending or eliminating statutory benefit programs that are created and funded solely by the States.

The Seventh Circuit nonetheless held that the Due Process Clause imposed individual procedural protections for thousands of unlicensed relative foster homes, even though the Illinois legislature had enacted a statute eliminating foster care payments for all unlicensed homes. Thus, Illinois has been enjoined from

implementing this statutory change for all existing unlicensed homes, at a cost of millions of dollars in unbudgeted funds. The implications of this ruling are far-reaching and the need for review by this Court is especially pressing, as this unprecedented expansion of the Due Process Clause comes at a time when State legislatures across the country are facing difficult decisions in reforming their public benefit programs during a time of fiscal crisis.

Illinois was facing just such a crisis when it enacted P.A. 89-21. A three-year study by DCFS indicated that the number of foster children placed with relatives almost quintupled in just seven years, from 5,500 in June 1988 to 25,700 by July 1995. The majority of these homes were unlicensed, and were not even approved under the State's "approval" rules for relative homes. Illinois, however, had a program providing state-funded foster care payments to these unlicensed homes in the same amount as payments to licensed homes. When the Illinois legislature acted to eliminate those payments, the federal court invoked the Due Process Clause to invalidate the statute as it applied to all current unlicensed recipients. The Seventh Circuit held that those recipients could not be deprived of property rights to unlicensed foster care payments -- even though such payments were statutorily eliminated in Illinois as of July 1, 1995 -- prior to being afforded an opportunity to become eligible for licensed payments -- even though these recipients had never before qualified or applied for such benefits.

This ruling flies in the face of this Court's basic premise that "[p]roperty interests are not created by the Constitution," but are instead defined by the terms of the State law creating such interests. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). Even though the Illinois statute eliminated foster care payments to unlicensed homes, the Seventh Circuit somehow construed the Due Process Clause to require that those payments continue until those homes applied and their eligibility was determined for an entirely different benefit, foster care payments to licensed homes. Contrary to the Seventh Circuit's reasoning, any "expectation" that these unlicensed homes might qualify as licensed homes simply is not a constitutionally protected interest. As this court held in Board of Regents v. Roth, 408 U.S. at 577, protected property interests do not arise from a "need or desire" for, or a mere "expectation" of, future benefits from the State. See also Lyng v. Payne, 476 U.S. 926, 942 (1986) (this Court has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement"). To hold otherwise would mean that any time a legislature eliminates one program but permits recipients to qualify for another, individual due process protections must be imposed. The Due Process Clause cannot be extended that far.

Instead, as this Court recognized in Atkins, 472 U.S. at 129-30, when the legislature acts to eliminate an entire category of benefits, the legislative process provides all the process due under the Constitution. The enactment by Illinois of P.A. 89-21

thus met the requirements of the Due Process Clause and was erroneously enjoined. This class-wide legislative action is not transformed into an individual, adjudicative decision merely because Illinois also permits unlicensed relatives to qualify as licensed foster homes to receive foster care payments. Thus, the Seventh Circuit's reliance on Logan is misplaced and cannot be used to circumvent the authority of the legislature to eliminate an entire State payment program.

If allowed to stand, this expansive view of the Due Process Clause will infringe upon the ability of State legislatures to make decisions to reform their own benefit programs, and will create new property interests every time a state statute alters welfare benefits, licensing programs or any state-imposed eligibility standards. By requiring thousands (in the case of welfare reform, hundreds of thousands) of individual eligibility determinations, the Seventh Circuit ruling means that any welfare or other benefit reform enacted today cannot become fully effective for months, if not years, and at significantly increased costs.

Thus, the States' ability to respond to ever-changing needs and competing demands will be greatly diminished, and the result will be programs, such as the foster care programs at issue here, that are less responsive to the State's needs, with scarce public resources being allocated in ways ill-suited to meet the public interest. Indeed, without greater certainty about the control of their own social welfare programs and about the effectiveness of any reform they might enact, legislatures may

well view in a different light their initial decisions whether to create such programs.

For these reasons, certiorari should be granted so this Court may review and correct the erroneous and unprecedented intrusion into state legislative decision-making represented by the opinion below.

## I.

## THE OPINION BELOW CONFLICTS DIRECTLY WITH THIS COURT'S LONG-STANDING PRECEDENT ON THE LIMITS OF THE DUE PROCESS CLAUSE WHEN STATUTORY BENEFITS ARE CHANGED BY STATE LAW

### A. Protected Property Interests Are Defined By State Law And Can Be Eliminated By State Law, Such As P.A. 89-21

It is firmly established that the origin and scope of property interests protected by the Due Process Clause stems from the legislature. As this Court has stated, "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law . . . ." Roth, 408 U.S. at 577-78; see also Loudermill, 470 U.S. at 538 (same). Thus, the legislature retains the ability to change the terms of any statutorily created property interest, and the requirements of the Due Process Clause "cannot be stretched

to impose a constitutional limitation on the power of [a legislature] to make substantive changes in the law of entitlement to public benefits." Richardson v. Belcher, 404 U.S. 78, 81 (1971).

The foster care payments at issue here were clearly State-created and State-funded benefits -- indeed, the payments by Illinois to unlicensed relative foster homes were nearly unique among all the states in the country. Consistent with Roth, the Illinois legislature plainly had the authority to enact changes in the terms of these benefits, including the right to "amend or terminate its welfare . . . programs." Logan, 455 U.S. at 432. Accordingly, as of July 1, 1995, all foster care payments to unlicensed foster homes as a class were eliminated. See P.A. 89-21, amending 20 ILCS 505/5(u-5) ("only foster care placements licensed as foster family homes pursuant to the Child Care Act of 1969 shall be eligible to receive foster care payments from the Department"). (App. 9a.) In the first half of its opinion, the Seventh Circuit itself recognized the Illinois legislature's authority; the court noted that as nothing in Title IV-E compelled DCFS to provide foster care payments to unlicensed relative homes, "nothing prevents it from now eliminating those benefits." (App. 28a.)

The Seventh Circuit, however, refused to give effect to this authority, and upheld the injunction compelling DCFS to continue foster care payments to unlicensed caregivers even after the statute had eliminated such payments. The court's

reasoning was based on the notion that currently unlicensed relative homes had a constitutionally protected interest in applying for a foster home license. However, an entitlement cannot arise from a "need or desire" for, or a mere "expectation" of, future payments from the State. Roth, 408 U.S. 564, 577 (1972); see also O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 796 (1980) (Blackmun, J., concurring) ("[T]he Constitution does not recognize expectancies that are 'unilateral' or 'too ephemeral and unsubstantial.'").

The Seventh Circuit erroneously held that a protected interest may exist when a legislature eliminates one program (foster care payments to unlicensed homes), yet continues another program for which recipients may still apply (foster care payments to licensed homes). However, none of the 8,000 unlicensed and unapproved homes here had ever previously applied for licensure or been determined eligible for licensure -- indeed, these unlicensed relatives had not even been "approved" under the DCFS rules for Title IV-E approval, despite the fact that they "had a fair opportunity to become 'approved.'" (App. 28a.) Contrary to the Seventh Circuit's holding, the individual procedural protections of the Due Process Clause do not extend to an expectation of or application for licensure. As noted in Lyng v. Payne, 476 U.S. at 942, this Court has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement." Indeed, in Roth itself, this Court rejected the argument by the dismissed teacher that he had a property interest

in his position because "most teachers hired on a year-to-year basis . . . are, in fact, rehired." Roth, 408 U.S. at 578 n.16. In the absence of any state law or regulation securing a claim to re-employment, such an "expectation" was not a property interest. Id. The "expectation" of a possible foster home license for these unlicensed homes is not enough to create a protected interest, and the unprecedented holding of the Seventh Circuit to the contrary should be reviewed by this Court and reversed.

### B. The Seventh Circuit Wrongly Refused To Recognize That The Legislative Process Here Provided All The Process Due Under The Constitution

The legislative process by which P.A. 89-21 was enacted provided all the process due under the Constitution for the elimination of unlicensed foster care payments. In Atkins, 472 U.S. at 129-30, this Court held that a legislative decision to amend or terminate a statutory entitlement program, such as P.A. 89-21, "provides all the process that is due." A legislature has the "plenary power to define the scope and the duration" of an entitlement it has created, and the recipients of such entitlements are "not deprived of due process when the legislature adjusts benefit levels." Id.; see also Logan, 455 U.S. at 432-33 ("the legislative determination provides all the process that is due" when a legislature decides to "amend or terminate its welfare or employment programs").

The rule that the legislature provides all the process that is due in amending or terminating entitlement programs stems

from the long-standing principle that notice and an opportunity for a hearing, the hallmarks of procedural due process, are neither practicable nor necessary in determining legislative rules. In Bi-Metallic, 239 U.S. at 445, Justice Holmes articulated this principle for the Court: "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption." The Bi-Metallic Court distinguished Londoner v. City of Denver, 210 U.S. 373 (1908), a case in which procedural due process rights were found to apply, by stating that in Londoner "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing." Bi-Metallic, 239 U.S. at 446. See also O'Bannon, 447 U.S. at 800 (Blackmun, J., concurring) ("When governmental action affects more than a few individuals, concerns beyond economy, efficiency, and expedition tip the balance against finding that due process attaches.").

This Court has continued to adhere to Bi-Metallic's pragmatic approach when considering procedural due process concerns in the context of class-wide legislative decisions that affect people in the aggregate. See United States v. Florida East Coast Ry., 410 U.S. 224, 246 (1973) (distinguishing between a "legislative-type judgment, for prospective application only," and "adjudicating a particular set of disputed facts"). As stated in Minnesota Board for Community Colleges v. Knight, 465 U.S. 271, 285 (1984):

> [T]he pragmatic considerations identified by Justice Holmes in [Bi-Metallic] are as weighty today as they were in 1915. Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard.

See also 2 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise, § 9.2, at 3 (3d ed. 1994) ("Procedural due process does not apply when government makes a policy decision that has an adverse impact on an entire classification of individuals or firms, e.g., all . . . recipients of social security benefits, even if the decision has the same adverse effect on the interests of the members of the group as would an individualized deprivation.").[5]

Plainly the enactment of P.A. 89-21 is just the class-wide legislative determination contemplated by Atkins and Bi-Metallic. The Seventh Circuit's own opinion compels this conclusion, noting that Illinois could properly decide under Title IV-E to eliminate payments to unlicensed homes. (App. 28a-29a.) The Seventh Circuit, however, disregarded its own characterization of P.A. 89-21, and held instead that P.A. 89-21 could not

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[5] See also Davis & Pierce, supra, at § 9.2, at 3 ("The distinction between individualized deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process, is central to an understanding of the U.S. legal system.").

be implemented without "individual eligibility determinations," even though most of the unlicensed relatives had not applied for licensure or even "approval." Individual procedural protections of prior notice and hearing for each of these relatives were required, even though such due process requirements apply only to "adjudicating a particular set of disputed facts." Florida East Coast Ry., 410 U.S. at 246; see also Davis & Pierce, supra, at § 9.2, at 3-4 (procedural due process applies only to "individualized fact-based deprivations," not "policy-based deprivations.").

However, the only determination to be made under P.A. 89-21 was whether a home was already licensed or not as of July 1, 1995, in order to decide whether foster care payments would be made. Such a decision is directly akin to the eligibility determination considered by this Court in Atkins, where Congress reduced the amount of a food-stamp recipient's earned-income that a State could disregard in computing the recipient's eligibility for food stamps. Implementation of the changes Congress enacted required calculating each recipient's individual eligibility under the amended provisions of the statute. See Atkins, 472 U.S. at 131 n.35. The statute was by no means "'self-executing.'" Id. at 144 n.21 (Brennan, J., dissenting). Nonetheless, this Court made clear that "individual eligibility determinations" were not at issue; the substantive change in eligibility standards was across the board and thus provided all the process that was due, notwithstanding individual application of that change. Atkins, 472 U.S. at 129; see also id. at

153 n.31 (Brennan, J., dissenting) ("implementation of the . . . law required the Department to make these determinations in each individual case").

Contrary to the Seventh Circuit's view, the "individual factual determinations" in Atkins actually surpass those needed to implement the class-wide policy decision in P.A. 89-21. Unlike the individual calculations required for each food-stamp recipient in Atkins, the change here in foster care payments was based on a purely "mechanical" application of the statute -- which foster homes were licensed as of July 1, 1995. This application did not involve individual eligibility or factual determinations, but rather only the same "class-wide" application of a legislative rule necessary to implement an across-the-board statute.

Thus, the Seventh Circuit's reliance on this Court's decision in Logan is entirely misplaced. Logan held that the Illinois Fair Employment Commission could not constitutionally dismiss a claimant's action because of the agency's failure to convene a fact-finding conference within the State-imposed 120-day deadline. 455 U.S. at 434. But this Court analyzed the 120-day deadline in Logan as "a procedural limitation on the claimant's ability to assert his rights, not a substantive [limit]." Id. at 433.

Here, the foster care payments to unlicensed caregivers were not eliminated as the result of a "procedural limitation"; the payments were eliminated as the result of the legislature's

substantive decision to eliminate the program providing such payments to unlicensed caregivers. P.A. 89-21 does not even purport to establish any procedures or deadlines for the licensing process. Indeed, it was uncontroverted that the July 1, 1995, effective date was selected to coincide with the start of the State fiscal year and to address in a timely manner the serious problems under the old HMR program. The effective date was thus not a "procedure" for "'determining the preconditions to adverse official action,'" Logan, 455 U.S. at 432 (quoting Vitak v. Jones, 445 U.S. 480, 491 (1980)); rather, it was simply the date chosen by the legislature to "amend or terminate its welfare . . . program[]." Id.[6]

Thus, Logan cannot be extended, as in the opinion below, to circumvent the limits on the Due Process Clause articulated

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[6] The Seventh Circuit also relied heavily upon a recent Ninth Circuit decision, Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995). (App. 35a-39a.) Greene, however, is distinguishable, as that case involved a tribe that was receiving benefits under a single federal program, and lost the benefits in that program when the eligibility standards changed. Id. at 1269. Here, the requirement of licensure or approval had always existed, but in addition, the State chose to provide payments to unlicensed and unapproved homes as well. The fact that all current recipients of these unlicensed and unapproved foster care payments will no longer receive such payments as the result of the legislature's decision to eliminate the program providing them does not implicate individual due process rights for each such recipient. Moreover, Greene required that only one hearing be held to determine whether the Samish Indians constituted a "tribe." Id. at 1273. Here, on the other hand, the opinion below requires Illinois to conduct literally thousands of individual determinations on "program eligibility" for licensed foster care payments.

in Atkins and its progeny. Otherwise, statutory changes now being considered across the country will be thrown into disarray, with the potential that major legislative reforms will now be subject to unduly expansive individual procedural protections unsupported by the Due Process Clause. Under the opinion below, these enactments will be challenged in federal court, leading to the unconstitutional intrusion of the federal judiciary into this policy-making arena.

## II.

## SUPREME COURT REVIEW IS NECESSARY TO CORRECT THE UNCERTAINTY CAST ON THE PREROGATIVE OF STATE LEGISLATURES TO ENACT CHANGES TO THEIR OWN BENEFIT PROGRAMS

If left to stand, the opinion below will serve as a critical erosion to a State's sovereign power to control the social welfare programs it creates and funds from its own fisc. See Seminole Tribe of Florida v. Florida, No. 94-12, 64 U.S.L.W. 4167, 4170 (March 27, 1996) (reaffirming that "each State is a sovereign entity in our federal system"). Perhaps most important, this erosion would come at a time when legislatures across the country are attempting to reform such programs. The issue of welfare reform across the nation is so important and so timely that Supreme Court review is necessary to clarify the legislatures' prerogative -- and, indeed, their democratic mandate -- to restructure and reform the very programs they created.

The reform to the Illinois child welfare system effectuated by P.A. 89-21 is but one of numerous welfare reform efforts taking place across the country. See, e.g., Recent Legislation, 109 Harv. L. Rev. 1168, 1168 (1996) ("Sparking a rancorous national debate, numerous state legislatures have recently enacted significant welfare reforms."); Sam Howe Verhovek, Welfare in Transition: The National Picture, N.Y. Times, Sept. 21, 1995, at A1 (stating that "[a]s a canvass of states indicates . . . 'welfare reform' has in fact been taking place all across the country"). In Illinois under P.A. 89-21, a foster caregiver must have a license to obtain foster care payments.[7] Requirements other states have imposed on social welfare recipients in their states include participation in "workfare" programs,[8]

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[7] "[O]nly foster care placements licensed as foster family homes pursuant to the Child Care Act of 1969 shall be eligible to receive foster care payments from the Department." P.A. 89-21, amending 20 ILCS 505/5(u-5). (See App. 9a.)

[8] See, e.g., 70 Del. Laws 66, § 2 (1995) (to be codified at Del. Code Ann., tit. 31, §§ 1501-10); 1995 Pa. Laws 20, § 3 (amending Pa. Stat. Ann. tit. 62, § 405.2 (Supp. 1995)).

time limitations on the receipt of benefits,[9] vaccinations,[10] and mandatory living arrangements.[11]

The Seventh Circuit's opinion below eviscerates a legislature's power to implement these and myriad other reforms in a timely and effective manner. The procedural due process constraints erected by the Seventh Circuit render State legislatures unable to reform, amend, or even terminate their own social welfare programs in response to the ever-changing social needs of their citizens. Instead of making public policy decisions on such programs, enacting them into law, and implementing them in a timely manner to meet those changing needs, legislatures attempting to enact responsive reform will be hindered by the burden of individual eligibility determinations required by the opinion below -- whether the reform concerns a license, vaccination, or some other requirement. Legislatures would be required to wait for months, if not years, to implement changes in social welfare programs. The larger the program is, the longer the delay will be, and the less effective and more costly the legislature's decision to reform it.

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[9] See, e.g., 1994 Ariz. Sess. Laws 166, § 1 (codified at Ariz. Rev. Stat. Ann. § 46-294 (Supp. 1995)), amended by 1995 Ariz. Sess. Laws 247, § 3; 1995 La. Acts 1219 (to be codified at La. Rev. Stat. Ann. § 46:460.I).

[10] See, e.g., 1994 Miss. Laws 582, § 1 (codified at Miss. Code Ann. sec. 43-49-9(4) (Supp. 1994)); 1995 Okla. Sess. Laws 346, § 10 (to be codified at Okla. Stat. tit. 56, sec. 230.8).

[11] See, e.g., 1995 S.C. Acts 102, pt. V, § 4 (requiring minor mothers receiving welfare benefits to live with parents).

Thus, in addition to intruding upon a sovereign State's right to control programs it creates, the opinion below stands to affect adversely the very people who are served by and are in most need of the resources legislatures have devoted to social welfare programs. The very social welfare programs at issue will become less responsive to changing social needs, and public resources will be allocated in ways ill-suited to meet the public interest. Indeed, with the knowledge that they may be unable to alter the social welfare programs they create, state legislatures may well re-think initial decisions whether even to create such programs.

Accordingly, it is critical that this Court review the opinion below. Legislatures must have guidance in the important area of procedural due process in drafting welfare reform legislation. Legislatures must be given reaffirmation by this Court that the decisions they make on a class-wide basis about social welfare programs will be their decisions to make, not a federal court's. Review by this Court would also serve the important interest of judicial economy for federal courts around the country dealing with litigation surrounding reforms to social welfare programs. Without such clarification, both courts and legislatures will encounter grave uncertainty about procedural due process protections due individuals in connection with welfare reform, even with respect to class-wide legislative alterations of social welfare programs.

## CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner Jess McDonald respectfully asks this Court to grant a writ of certiorari in this cause, and reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Dated: April 16, 1996
Chicago, Illinois

Respectfully submitted,

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# APPENDIX

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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Nos. 95-2575 & 95-2813
MARCEL YOUAKIM, LINDA YOUAKIM, individually, and as foster parents, and TIM ROBERTSON, and all others similarly situated,

*Plaintiffs-Appellees/Cross-Appellants*,

v.

JESS MCDONALD, Director, Illinois Department of Children and Family Services,*

*Defendant-Appellant/Cross-Appellee*.

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Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 73 C 635 **John A. Nordberg**, *Judge*.

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ARGUED SEPTEMBER 27, 1995 DECIDED
DECEMBER 6, 1995**

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Before H. WOOD, JR., ROVNER, and EVANS, *Circuit Judges*.

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* In accordance with Fed. R. Civ. P. 25(d)(1), Jess McDonald, current Director of the Illinois Department of Children and Family Services, has been substituted as the defendant in this action for Jerome Miller, the Department's director when the suit was originally filed.

** This opinion was originally released in typescript.

ROVNER, *Circuit Judge*. The dispute before us in this twenty-two-year-old case concerns the implementation of legislative reforms to Illinois' foster care benefit program. *See* P.A. 89-21, *amending*, 20 ILCS 505/5. Earlier this year, the Illinois Department of Children and Family Services ("DCFS" or "the Department") proposed its Home of Relative Reform Plan ("HMR Reform"), which was passed by the Illinois General Assembly and signed into law by Illinois' Governor in June of this year. Under HMR Reform, all homes providing foster care must be licensed under state law before resident children will be eligible to receive foster care benefits. Prior to the effective date of the reforms (July 1, 1995), however, Illinois required a license only for homes providing foster care to non-relative children. Children who were cared for by relatives, by contrast, were eligible to receive benefits although they resided in unlicensed homes. The effect of the reforms, then, is to terminate the foster care benefits of children in relative homes while the homes attempt to become licensed.

Plaintiffs, a class of foster parents and children who stand to lose their benefits because their homes are not yet licensed, invoked the district court's continuing jurisdiction to enforce the August 24, 1976 judgment entered in this case for the purpose of challenging the implementation of the reforms. Plaintiffs do not quarrel with the new licensing requirement but contend that their benefits cannot be terminated before they are provided an adequate opportunity to become licensed. They argue that the transition process, by denying them such an opportunity,

violates the earlier judgment and the Due Process Clause of the Fourteenth Amendment. On the day before the reforms were to take effect, the district court enjoined the Department's Director from terminating or suspending foster care payments to children in unlicensed relative homes without first providing those homes the opportunity to have a license application determined on its merits. The district court explained in a detailed opinion how the proposed implementation of HMR Reform would violate the 1976 judgment and plaintiffs' right to due process. *See Youakim v. McDonald*, No. 73 C 635, slip op. (N.D. Ill June 30, 1995). The Director appeals that interlocutory injunction to this court, invoking our jurisdiction under 28 U.S.C. § 1292(a)(1).[1] We now affirm the district court's injunction as modified below.

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[1] The Director asked the district court to stay enforcement of its order pending resolution of his appeal. That court denied the Director's motion, but another panel of this court agreed to expedite the Director's appeal and to stay enforcement of the district court's injunction. This panel then heard oral argument on September 27, 1995, three days prior to the date on which children in approved but unlicensed relative homes were scheduled to lose their benefits. After argument, we vacated the stay order, thus preventing the Director from enforcing the scheduled cut-off date. On the following day, however, we were notified that DCFS had extended the cut-off date to January 1, 1996. Because this ensured that children in approved relative homes would retain their benefits during the pendency of this appeal, we granted the Director's motion to reconsider and reimposed the stay.

## I. BACKGROUND

The relevant facts are not disputed. The parties stipulated to many of the facts below, and the district court made further factual findings after a two-day evidentiary hearing. Because the Director has not challenged the district court's findings here, we accept them as true and describe them below along with the stipulated facts. First, however, we provide a brief history of the earlier litigation that culminated in the entry of the 1976 judgment.

### *A. The Earlier Case*

The initial dispute in this case involved Illinois' decision to exclude children in relative homes from eligibility for foster care benefits. *See Miller v. Youakim*, 440 U.S. 125, 130-31 (1979) (citing Ill. Ann. Stat. ch. 23, § 2212.17 (Supp. 1978)). Illinois paid such benefits only to children in homes that were licensed under state law, and it prohibited the licensing of relative homes. Thus, a child placed with a relative was ineligible to receive foster care benefits although the same child would have been eligible had he been placed in the home of a non-relative. The district court certified a class of related children and foster parents and subsequently held that Illinois' policy of denying foster care benefits to otherwise eligible children in relative homes violated §§ 401 and 408 of the Social Security Act, 42 U.S.C. §§ 601 & 608. *See Youakim v. Miller*, 431 F. Supp. 40 (N.D. Ill. 1976). In a judgment dated August 24, 1976, the

court invoked the Constitution's Supremacy Clause to enjoin Illinois from enforcing any state law or administrative policy that had the effect of denying full foster care benefits to such children. The district court's judgment was affirmed by this court, 562 F.2d 483 (7th Cir. 1977), and by a unanimous United States Supreme Court, 440 U.S. 125 (1979). The present dispute involves developments in Illinois since the Supreme Court's 1979 decision.

*B. Pre-Reform System*

When DCFS takes over custody or guardianship of a child, it attempts to make a substitute placement with either a relative, a non-relative, a group home, or an institution. Subsequent to the Supreme Court's decision in *Miller*, Illinois has paid foster care benefits to children placed in three categories of homes preapproved, approved, and licensed. Both the preapproved and approved categories were comprised entirely of relative homes, because Illinois law still required, as it had prior to the *Miller* decision, that all non-relative caregivers be licensed. Although a relative home could also obtain a license, it was not required to do so before a child could be placed and receive foster care benefits.

In contrast to non-relative homes, DCFS is permitted to place a child in a relative home even before that home becomes licensed or approved under state law. The home must only pass an initial safety check that is considerably less detailed and onerous for both DCFS and the caregiving family than the

licensing and approval processes. *See* 89 Ill. Admin. Code § 335.202 (detailing "pre-conditions" for placement of child in relative home) (repealed effective July 1, 1995). A home that has passed this initial safety check is referred to as a "preapproved" home. Such a home could subsequently become approved or licensed under state law, although it had no financial incentive to do so because licensure was not a requirement for the receipt of full foster care benefits. Because these homes were neither approved nor licensed under state law, however, the federal government did not reimburse the State for benefits paid to resident children under the terms of the Social Security Act. *See* 42 U.S.C. § 672(c) (providing for federal reimbursement of payments made only to children in licensed or approved homes).

In 1986, Illinois officially recognized a category of "approved" relative homes, which were required to meet standards "substantially the same with regard to the safety, health and welfare of children as those promulgated for licensure of unrelated foster family homes pursuant to the Child Care Act of 1969." 89 Ill. Admin. Code § 335.102 (repealed effective July 1, 1995); *see also* 89 Ill. Admin. Code § 402 (setting out licensing standards for foster family homes) (amended effective July 1, 1995).[2] Once DCFS confirmed that a relative home met

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[2] It does not appear that in 1973, when the Youakims filed this lawsuit, the State of Illinois maintained an official category of "approved" relative homes. The district court found as a factual matter, however, that the

(continued...)

its licensing standards, the State of Illinois qualified for federal reimbursement of foster care benefits paid to resident children even if the home was not actually licensed. *See* 42 U.S.C. § 672(c) (a "foster family home" under the Social Security Act includes a home that "has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing"). The district court found that Illinois created the approved category in 1986 at least in part to make it easier for DCFS to place dependent children with relative caregivers.

When a child is first placed in DCFS custody or guardianship, she is assigned a caseworker who attempts to procure a placement for that child. The caseworker also has the responsibility, once a placement is made, of shepherding the caregiver through the approval and licensing processes. The caseworker assigned in any given circumstance may be employed by DCFS itself, or by one of sixty-seven child welfare agencies (*e.g.*, Catholic Charities) that work on behalf of the Department. As of April 30, 1995, the cases of 31,596 out of 47,007 dependent children placed in private homes were managed by private

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[2](...continued)
Youakim home had been approved by the State of Illinois as meeting its licensing standards for purposes of section 408 of the Social Security Act, 42 U.S.C. § 608.431 F. Supp. at 43-44 & nn.4 & 5; *see also* 562 F.2d at 488 (rejecting claim that district court's factual finding was in error).

welfare agencies rather than by DCFS itself.[3] Nine of the sixty-seven participating private welfare agencies are what we will call "approval only," meaning that caseworkers from those agencies have no authority to license or to participate in the licensing of a foster family home. Children who were assigned to a caseworker from such an agency thus had little if any opportunity to reside in a licensed home.

The district court found, moreover, that to the extent DCFS and the private agencies encouraged preapproved relative caregivers to become either approved or licensed, they generally encouraged the approval process, which was less onerous for both the placing agency and the caregiving family. Whether a relative home was licensed or merely approved also made no difference to the State's ability under the Social Security Act to receive federal reimbursement for dispersed benefits. *See* 42 U.S.C. § 672(c) The statistical evidence before the district court revealed that as of April 30, 1995, only 1.2 percent of all children residing in relative homes lived in licensed homes, whereas 42.6 percent of those children lived in approved homes. An additional 22.2 percent lived in preapproved homes that

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[3] More than half of the total number of children in DCFS custody had been placed in relative homes (26,368 out of 47,007), which was consistent with Illinois' preference for relative placements. *See* 20 ILCS 505/7(b) (amended effective July 1, 1995).

had applications for approval pending.[4] The district court found from the statistical evidence that the private welfare agencies had been more successful than the Department in getting relative homes approved or licensed 44.8 percent of private agency homes were approved or licensed as compared to only 21.4 percent of DCFS homes. The Department's failure in this regard is surprising in light of the fact that the State of Illinois is entitled to federal reimbursement only for foster care benefits paid to children in licensed or approved homes. Because the State also paid unreimbursed benefits to relative children in preapproved homes, DCFS had a significant incentive to shepherd relative homes at least through the approval process. The fact that so many relative children received unreimbursed benefits from the State was one factor that prompted the reforms.

*C. HMR Reform*

DCFS proposed HMR Reform on March 1, 1995, and it became law a little more than three months later. The operative reform provision relevant to this litigation provides as follows:

> Effective July 1, 1995, only foster care placements licensed as foster family homes pursuant to the Child Care Act of 1969 shall be eligible to receive foster care payments from the Department. Relative caregivers who, as of July

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[4] The statistics are similar if relative homes themselves, as opposed to children in relative homes, are considered: 1.3 percent of relative homes were licensed, 35.2 percent were approved, and 26.1 percent had applications for approval pending.

> 1, 1995, were approved pursuant to approved relative placement rules previously promulgated by the Department at 89 Ill. Adm. Code 335 and had submitted an application for licensure as a foster family home may continue to receive foster care payments only until the Department determines that they may be licensed as a foster family home or that their application for licensure is denied or until September 30, 1995, whichever occurs first.

P.A. 89-21, *amending* 20 ILCS 505/5(u-5). Under HMR Reform, then, Illinois will pay foster care benefits only to those relative and non-relative homes that are licensed under state law. The new licensing requirement has no effect on non-relative homes, as Illinois has always required such homes to be licensed. For existing relative homes, however, the impact of the reforms is significant and potentially devastating. Children in preapproved relative homes who qualified to receive foster care benefits prior to July 1, 1995 would have their benefits eliminated on that date, regardless of whether their caregiving home applied to DCFS for a license on or before June 30, 1995.[5] Foster care benefits to children in preapproved homes would be reinstated

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[5] The foster care benefits of children in preapproved homes were in fact eliminated in July of this year, after a panel of this court stayed enforcement of the district court's injunction pending resolution of the Director's appeal. Because the order we are reviewing speaks of the implementation process as a future event, rather than as having already begun, we follow the same format for the sake of consistency, recognizing however that certain of the reforms already have been implemented by the time of this writing.

under HMR Reform only if the home were to ultimately succeed in obtaining a license, and the affected child would not then be entitled to recover the benefits lost between July 1 and the date of licensing. As of July 1, children in preapproved homes would begin to receive assistance under two alternative programs, but at significantly reduced benefit levels.

While HMR Reform cuts off benefits to children in preapproved relative homes, it eliminates entirely the category of approved relative homes. Those homes that were previously approved by the State of Illinois as meeting its licensing standards must also become licensed in order for resident children to retain their foster care benefits. In contrast to its treatment of preapproved homes, however, HMR Reform provides a transition process that enables approved homes to apply for a license while resident children retain their current benefits. If an approved home submits a license application on or before June 30, resident children retain their benefits until the Department denies the application or until September 30, 1995, whichever occurs first.[6] But this procedure does not ensure that a child's benefits will not be eliminated before the Department renders a decision on the license application. Indeed, the district court found from the statistical evidence that the Department would be unable

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[6] The Director's counsel told us at oral argument that approximately ninety percent of homes in the approved category submitted license applications by June 30. As we explained *supra*, at n.1, DCFS extended the September 30 cut-off date to January 1, 1996.

to process and decide the applications of approved homes prior to the scheduled cut-off date.[7]

After the implementation of HMR Reform, relative and non-relative caregivers will be required to meet the same licensing standards, which are slightly more stringent than those that were in place prior to HMR Reform. A home that was licensed as of July 1, 1995, however, need not meet the new standards until its current license expires.[8] Approved and preapproved relative homes, however, must immediately meet the new licensing standards in order to retain their current benefits.

Prior to HMR Reform, it was the Department's policy that preapproved caregivers must apply to be approved or licensed to retain a child placed in their care. As the district court observed, however, the Department rarely enforced this policy because approximately one-third of relative homes were

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[7] When the court made that finding, the cut-off date was September 30, 1995, rather than January 1, 1996. The court was unable from the evidence to estimate the time it would take DCFS to process the large number of license applications that would be generated by the reforms, finding only that the average period for processing an application would exceed ninety days. (Dist. Ct. Mem. Op. at 17-18.) The Director's counsel also was unable to estimate at oral argument how many license applications would remain pending after September 30.

[8] Prior to HMR Reform, a license was valid for two years unless revoked by the Department (89 Ill. Admin. Code § 402.6(a) (1994)), but a license issued under the new standards is valid for four years. 89 Ill. Admin. Code § 402.7(a) (effective July 1, 1995).

both unapproved and unlicensed as of April 30, 1995. (Dist. Ct. Mem. Op. at 12 n.11.) Under HMR Reform, a preapproved relative home is required to obtain a license only to enable a resident child to receive foster care benefits; the lack of a license does not affect its ability to provide care for the child. Thus, DCFS will not remove children previously placed with approved or preapproved relative homes if those homes fail to apply for or to obtain a license under HMR Reform. It simply will refuse to pay foster care benefits to children in such homes.

DCFS began the process of implementing HMR Reform even before Illinois' Governor signed the legislation into law. The Department first notified relative caregivers of the reforms in April 1995. It then provided a second notice on April 28, 1995, and this time included a license application in notices sent to approved homes and preapproved homes with applications for approval pending. Preapproved homes that had not yet applied for approval were instructed to obtain a license application from their caseworker. DCFS sent yet another notice to relative caregivers on approximately June 12, 1995.

*D. The Proceedings Below*

Plaintiffs invoked the district court's continuing jurisdiction under the 1976 judgment to revive this long-dormant litigation, arguing that the implementation of HMR Reform would violate the judgment order. Plaintiffs asked that the implementation process be enjoined and that the Director be held in contempt. After expedited discovery and briefing, the district court absolved

the Director of the contempt charge, but on the day before their scheduled effective date, the court enjoined the implementation of the reforms as to existing benefit recipients residing in approved and preapproved relative homes. Specifically, the court prevented the Director from eliminating the foster care benefits of children in unlicensed relative homes without first providing those homes an adequate opportunity to become licensed. The court concluded that the transition proposed by the Department would violate the judgment order, the Social Security Act, and the Due Process Clause of the Fourteenth Amendment. To remedy these violations, the court required DCFS to mail an additional notice of the reforms to both approved and preapproved relative caregivers and to include with the notice a license application. The caregiver would then have thirty-five days from the date of mailing to submit the application to the Department. DCFS would be entitled to eliminate the foster care benefits of any child in a relative home that failed to submit a license application within thirty-five days. For children in homes submitting timely applications, however, DCFS would be enjoined from eliminating benefits until a decision was rendered on the application. The court's injunction had the effect, therefore, of prohibiting enforcement of the September 30, 1995 (now January 1, 1996) cut-off date as to those approved homes with timely license applications pending, and of preventing the July 1, 1995 termination of benefits to children in preapproved homes.

## II. DISCUSSION

We review the district court's interlocutory injunctive order in accordance with Fed. R. Civ. P. 52(a). We review the court's factual findings for clear error and its conclusions of law de novo. *Durasys, Inc. v. Leyba*, 992 F.2d 1465, 1471 (7th Cir. 1993). To the extent Judge Nordberg interpreted the terms of the 1976 judgment, which was entered by a different district judge, we accord his interpretation no deference and review the requirements of that judgment de novo. *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 908-09 (7th Cir. 1995). We first consider whether plaintiffs were entitled to relief under the 1976 judgment and the provisions of the Social Security Act giving rise to that judgment. We then address plaintiffs' claim under the Due Process Clause. *See Atkins v. Parker*, 472 U.S. 115, 123 (1985) (considering statutory issue prior to reaching constitutional question).

### *A. 1976 Judgment Order*

#### 1.

Plaintiffs contend that the transition to HMR Reform violates the 1976 judgment, which prohibits the State from enforcing any law or administrative policy that has the effect of denying full foster care benefits to otherwise eligible children in relative homes. Plaintiffs maintain that by eliminating the foster care benefits of children in unlicensed relative homes, DCFS will be discriminating against those homes on the basis of their

relative status. The Director disagrees, arguing that because relative and nonrelative homes have the same opportunity to become licensed under HMR Reform, there is no violation of the earlier judgment. Yet the district court found that the licensing opportunities are the same only for relative children and parents who enter the foster care system after the July 1, 1995 effective date of the reforms. All plaintiffs here were receiving foster care benefits under Illinois' prereform system, and they challenge only the process of transition to rather than the substance of the reforms. The district court found that the Department's proposed transition had the effect of denying full benefits to otherwise eligible children in relative homes solely because of their relative status. The court's finding was based on the undisputed fact that Illinois had previously channelled relative homes toward the approved or preapproved categories without providing those homes an equal opportunity to become licensed. The court concluded that by now eliminating the benefits of children in unlicensed relative homes, the Department would be disfavoring relative caregivers in violation of the earlier judgment order, and it therefore enjoined implementation of that aspect of the reforms.

The 1976 judgment is in the nature of an injunction, and in construing its terms, we must pay particular heed to the nature of the dispute in which it originated. In general terms, we must construe injunctions in light of the circumstances that produced them, which may include the nature of the original claim, the relief that was sought, the evidence presented at any hearing or trial, the issues actually decided by the earlier tribunal, and

the mischief the injunction was designed to eradicate. *See City of Vicksburg v. Henson*, 231 U.S. 259, 273 (1913); *Haskell v. Kansas Natural Gas Co.*, 224 U.S. 217, 223 (1912); *United States v. Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972). This is another way of saying that the terms of an injunction, like any other disputed writing, must be construed in their proper context. *Cf. Florida East Coast Ry. Co. v. CSX Transp., Inc.*, 42 F.3d 1125, 1129 (7th Cir. 1994) (language in settlement agreement must be interpreted with attention to the circumstances under which it was written). As a result, courts at times will construe a broadly-worded injunction more narrowly in order to be faithful to the issues actually raised and decided in the earlier litigation. *See Vicksburg*, 231 U.S. at 269; *Nerney v. New York N. H. & H. R. Co.*, 83 F.2d 409, 411 (2d Cir. 1936). At the same time, however, courts have found conduct to violate an injunction if it threatens the spirit if not the literal language of the earlier order. *See Christie Indus.*, 465 F.2d at 1009-11; *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d Cir. 1942); *see also Schering Corp.*, 62 F.3d at 906-07.

The Director here argues that in finding a violation of the 1976 judgment, the district court impermissibly expanded the scope of a limited and relatively ancient injunction. In the Director's view, the 1976 judgment was addressed only to a limited violation of the federal Social Security Act, and it thus should not be read to prohibit substantive reforms to Illinois' foster care program so long as access remains equally open

and available to relatives and non-relatives alike. In order to address the Director's argument, then, we must consider the nature of the dispute that culminated in the earlier judgment.

2.

In 1973, when the underlying lawsuit was filed, only children in homes licensed by the State of Illinois were eligible to receive foster care benefits. *See Miller*, 440 U.S. at 131. Under state law, moreover, relative homes could not obtain a license because Illinois defined a "foster family home" to include only those facilities providing family care to children "unrelated to them." *See id.* at 130-31 (quoting former Illinois statute). Thus, although their home had been approved by DCFS "as meeting the licensing standards established for unrelated foster family homes," the Youakims were ineligible under Illinois law to receive foster care benefits because the children in their care were relatives. *Id.* at 130; *see also Youakim*, 562 F.2d at 488; 431 F. Supp. at 43-44 & n.4. Plaintiffs maintained that Illinois' practice of paying benefits only to children in unrelated homes violated the federal Social Security Act, which in their view did not distinguish between related and unrelated foster homes.

The Social Security Act sets out the circumstances under which the federal government will reimburse states for foster care payments made to dependent children. To qualify for reimbursement, the state must have placed a child in a "'foster family home or child-care institution.'" *Miller*, 440 U.S. at

127-28 (quoting 42 U.S.C. § 608(a)(3), *now codified at* 42 U.S.C. § 672(a)(3)). "Foster family home" is defined in the Act to include a home "'which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing.'" *Id.* at 127 n.1 (quoting 42 U.S.C. § 608(f), *now codified at* 42 U.S.C. § 672(c)). The question raised by plaintiffs' earlier claim was thus whether Illinois' decision to exclude relative homes from its definition of a "foster family home," and therefore to deny benefits to children in relative homes that had been approved by DCFS, violated federal law.

The district court, this court, and a unanimous United States Supreme Court all found that Illinois was violating the Act. 431 F. Supp. 40 (N.D. Ill. 1976), *aff'd*, 562 F.2d 483 (7th Cir. 1977), *aff'd*, 440 U.S. 125 (1979). The Supreme Court held that the Social Security Act requires benefits to be paid to "any home that a State approves as meeting its licensing standards." 440 U.S. at 135; *see also id.* at 145 ("we hold that the [federal] program encompasses foster children who, pursuant to a judicial determination of neglect, have been placed in related homes that meet a State's licensing requirements for foster homes."). This court had reached a similar conclusion: "if the Youakims' home has been approved by the DCFS as meeting the standards established for the licensing of foster care homes, it falls within the statutory definition." 562 F.2d at 487. Thus, the Supreme Court and this court found it inconsistent with federal law for

Illinois to approve related homes as meeting its licensing standards but then to deny benefits to those homes on the ground that they were not actually licensed. *See* 440 U.S. at 140-41; 562 F.2d at 487-88. This was the "mischief" the 1976 judgment was designed to eradicate.

3.

The question here is whether Illinois' transition to HMR Reform also denies benefits to otherwise eligible children in relative homes. Plaintiffs contend that by denying benefits to children in approved and preapproved relative homes while those homes attempt to become licensed under HMR Reform, the Director will violate paragraph four of the judgment order, which provides as follows:

> Defendants, their agents, employees and all other persons in active concert with them are enjoined from:
>
> > (a) enforcing [Illinois law] and all implementing administrative policies and procedures, insofar as they exclude from eligibility, or deny full [Title IV-E] payments or ancillary benefits to, foster children living in foster homes maintained by related foster parents, and to these related foster parents, when such children and such parents are otherwise eligible for such payments and benefits;
> >
> > (b) failing to pay full [title IV-E] payments to foster children living in foster homes maintained by related foster parents, and to these related foster parents, when

> such children and parents are otherwise eligible for such payments . . . .

(August 24, 1976 Judgment ¶ 4.) The parties focus their dispute on whether relative children and parents in approved and preapproved homes are "otherwise eligible" to receive foster care benefits under the terms of the judgment.

Plaintiffs maintain that relative children and parents are "otherwise eligible" under paragraph four "if they claim that they will meet federal statutory eligibility requirements, correctly interpreted." (Pl. Br. at 25.) Under plaintiffs' interpretation, then, it would make no difference whether a home has been approved or only preapproved under the pre-reform system because homes in both categories could claim, in applying for a license, that they in fact will meet federal eligibility criteria. The Director, by contrast, contends that relative children and parents are not "otherwise eligible" under paragraph four unless their homes actually have been licensed under Illinois law. Because HMR Reform eliminates the category of approved relative homes, the Director believes that "'approved' relatives are no longer 'otherwise eligible' for [foster care benefits], unless [and until] they become licensed under the new licensing standards." (Director's Reply Br. at 8.) We do not believe that either of these interpretations is the correct one, as neither plaintiffs nor the Director pay proper heed to the nature of plaintiffs' claim in the underlying litigation or the violation of federal law that the judgment was designed to eradicate.

The Supreme Court and this court found that Illinois' former practice of paying foster care benefits only to children under

the care of non-relatives who were licensed under state law violated the Social Security Act because homes approved by a state as meeting its licensing standards are encompassed within the Act's definition of a "foster family home." *See Miller*, 440 U.S. at 135; *Youakim*, 562 F.2d at 487. Thus, a state violates federal law by approving relative homes but denying benefits to children in those homes because the home is unlicensed. The Act of course does not require that a state approve any home as meeting its licensing standards, and as plaintiffs concede, Illinois does not violate the Act by eliminating the "approved" category and requiring in the future that dependent children reside in licensed homes before they will be eligible for foster care benefits. (*See* Dist. Ct. Mem. Op. at 21.)

But what of the many homes that Illinois already has approved as meeting its licensing standards? Does the State's subsequent elimination of the "approved" category have the effect, as the Director contends, of negating the status those homes previously attained and eliminating the State's obligation to pay benefits under the Act? We think not, because the State previously approved these homes as meeting its licensing standards and made that approval effective for a period of four years. *See* 89 Ill. Admin. Code § 335.300 (repealed effective July 1, 1995). The State is now attempting to remove the "approved" designation prior to the expiration of the four-year period without providing the affected homes an adequate opportunity to obtain a license before losing their benefits. Yet because homes in the approved category meet Illinois' licensing standards, as

determined by the Department itself,[9] those homes are covered by the Act (*see* 42 U.S.C. § 672(c)), just as the Youakim home was in 1976. The fact that Illinois now has eliminated the "approved" category and has required all foster homes to be licensed does not eviscerate the fact that it already approved these relative homes as meeting its licensing standards. *Cf. Miller v. Carlson*, 768 F. Supp. 1331, 1339 (N.D. Cal. 1991) (enjoining California from eliminating Aid to Families with Dependent Children ("AFDC") payments to plaintiffs in previously-approved educational and training programs). It is thus unpersuasive for the Director to argue that plaintiffs in the "approved" category are not actually "approved" because the State eliminated that category under HMR Reform. Illinois also had no official "approved" category in 1976, but the Supreme Court required the State to pay foster care benefits to the Youakims, who had been approved by the State as meeting its licensing standards. *See* 440 U.S. at 130, 137-38; *see also Youakim*, 562 F.2d at 487-88 & n.5. The claim of the present plaintiffs is even stronger, as they have officially been approved as meeting the State's licensing standards.

In short, the Director's argument that approved relative homes are ineligible for foster care benefits because they are not licensed fares no better today than it did in the 1970s. *See*

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[9] *See* Ill. Admin. Code § 335.102 (repealed effective July 1, 1995) (approval standards "are substantially the same with regard to the safety, health and welfare of children as those promulgated for licensure of unrelated foster family homes pursuant to the Child Care Act of 1969.").

*Youakim*, 562 F.2d at 488. This court and the Supreme Court held that a licensing policy under which a state approves homes as meeting its licensing standards without actually issuing a license, and then denies benefits on the ground that the home is unlicensed, violates the Act, because children in approved homes meet federal eligibility criteria and cannot be denied benefits. *Miller*, 440 U.S. at 134-135, 145; 562 F.2d at 486-87. It was therefore a violation of the Act in 1976 for Illinois to license and to pay benefits only to children in unrelated homes, and we think it also violates the Act today for Illinois to deny benefits to children in relative homes it previously approved as meeting licensing standards on the ground that the approved category has now been eliminated and the home is currently unlicensed, particularly where the State has provided approved homes with little if any opportunity to become licensed.

The Director tells us, however, that these situations are distinguishable because homes currently in the approved category always had the opportunity to become licensed but failed to avail themselves of that opportunity. Yet the district court found that DCFS itself was responsible for the unlicensed status of these homes (Dist. Ct. Mem. Op. at 23), and its findings in that regard have not been challenged on appeal. Specifically, the district court found that the licensing process was not effectively available to relative homes for two reasons. First, DCFS preferred to place children with relative caregivers, and "to the extent [it] encouraged relative caregivers to apply to become approved or licensed, DCFS usually encouraged the approval process, which was easier for both DCFS and the family

involved." (Dist. Ct. Mem. Op. at 10, 16.)[10] Second, with respect to relative placements made by private agencies, which significantly outnumbered the placements made by DCFS itself, the licensing process was sometimes completely unavailable, as nine of sixty-seven private placement agencies were authorized to approve but not to license relative homes. (*Id.* at 16.) For homes handled by these agencies, then, no opportunity to obtain a license was ever available. (*Id.*) Because the licensing process was thus not equally available to relative homes in the years prior to HMR Reform, those homes are in much the same position today as relative homes were in 1976 *i.e.*, they could be approved as meeting Illinois' licensing standards, but they did not have the same opportunity as non-relative homes to become licensed. To deny foster care benefits to children in these approved homes during the transition to HMR Reform

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[10] In that regard, the district court found:

> As of April 30, 1995, only 1.2% of all related children in foster care resided in licensed homes, while 42.6% of such children lived in approved homes. In addition, 22.2% of the preapproved homes had applications for approval pending. With respect to number of homes, the evidence is similar. As of April 30, 1995, 1.3% of all homes with related children were licensed while 35.2% were approved. Homes with pending applications for approval accounted for 26.1% of the total number of homes with related children.

(*Id.* at 17.) Moreover, the Director stipulated below that DCFS created the "approved" category in 1986 in part to make it easier for the agency to place children with relative caregivers. (*Id.* at 9.)

on the ground that the home is not licensed will thus discriminate against children that are "otherwise eligible" for benefits under the Social Security Act solely on the basis of their relative status. Implementation of the reforms as to approved but unlicensed relative homes will therefore violate both the Act and paragraph four of the 1976 judgment. To prevent such a violation, the district court properly enjoined the Director from denying foster care benefits to children in approved relative homes until he has provided those homes an adequate opportunity to become licensed.[11]

4.

The district court's injunction was not limited to relative homes in the approved category, however, because it also prevents the Director from eliminating the benefits of children in preapproved relative homes.[12] The court did not distinguish between homes in the approved and preapproved categories but found that Illinois' former practices disfavored all relative caregivers in violation of the judgment order. Yet we do not believe that either the Social Security Act or the 1976 judgment

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[11] As to these homes, the district court's injunction will not cost Illinois a cent because the federal government reimburses the State for foster care benefits paid to dependent children in approved homes.

[12] The Director stopped paying benefits to these children, however, in July of this year, after a panel of this court stayed enforcement of the injunction.

would prevent the Director from implementing HMR Reform with respect to relative homes in the preapproved category, even if those homes had an application for approval pending on the effective date of HMR Reform. The 1976 judgment goes no further than to enjoin the State from implementing laws or policies that violate federal law, and Illinois would not violate the Social Security Act by eliminating the benefits it previously paid to children in relative homes that were neither licensed nor approved under state law.

As we explained above, section 672(c) defines a "foster family home" to include licensed homes and those approved by the appropriate agency as meeting the state's licensing standards. Significantly, the statute encompasses only those homes that *have been approved* (42 U.S.C. § 672(c)), not, as plaintiffs suggest, homes merely claiming to be capable of meeting approval requirements. Consistent with the language of the statute, then, each court that considered the Youakims' earlier claim emphasized that the Youakim home *had been approved* by DCFS as meeting the licensing standards of the State of Illinois. *See* 440 U.S. at 130, 135; 562 F.2d at 486, 488; 431 F. Supp. at 43-44 & n.4. But a relative home not so approved is not a "foster family home" under the Act, and thus, the Act does not require the State to pay foster care benefits to a child in such a home. Indeed, if a state decides to pay foster care benefits to children in preapproved homes, as Illinois did, it receives no reimbursement from the federal government under the Act.

The fact that Illinois chose for a period of years to pay foster care benefits to children in preapproved homes does nothing to change the requirements of federal law. The State's decision to eliminate payments that were never required by the Act could not itself violate the Act. Moreover, plaintiffs in the preapproved category do not argue, and the district court did not find, that the former *approval* process was unavailable to them. Those plaintiffs had a fair opportunity to become "approved." Indeed, more than one-third of the relative homes in Illinois had been approved, and many more had applications for approval pending on the effective date of HMR Reform.[13] The district court focused instead on the fact that plaintiffs in the preapproved category lacked a financial incentive to endure the approval or licensing processes because Illinois voluntarily exceeded its obligations under the Social Security Act and paid full benefits even to children in preapproved homes. Again, however, nothing in the federal statute required Illinois to extend foster care benefits to these children, and nothing prevents it from now eliminating those benefits. Thus, because children in preapproved homes do not reside in "foster family homes" for purposes of section 672 of the Act, they are not "otherwise

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[13] The district court did find that there were certain administrative problems at DCFS that hindered the approval and licensing processes (Dist. Ct. Mem. Op. at 11), but the court did not rely on this fact in concluding that homes in the preapproved category also were entitled to relief under the Judgment Order. The court's findings in that regard, however, would not support a conclusion that the approval process was unavailable to relative homes.

eligible" for foster care benefits within the meaning of paragraph four of the 1976 judgment. That is the only interpretation of the "otherwise eligible" language that is faithful to the injunction's purpose of eradicating the identified violation of federal law. The judgment cannot be read to confer benefits on children in preapproved homes to which the Act did not otherwise entitle them. Plaintiffs in the preapproved category were thus entitled to no relief in the district court under the terms of either the 1976 judgment or the Social Security Act.

*B. Due Process*

The district court found that the proposed transition to HMR Reform also violates the procedural due process rights of children in approved and preapproved relative homes. The Director challenges this conclusion too, contending that the legislative reforms eliminated any property interest the children may have had in continued benefits, and alternatively, that the legislative process was all that was due. Having found that only those relative children residing in approved homes are entitled to relief under the earlier judgment, we must reach this constitutional question, as it also concerns the rights of children in preapproved homes.

In analyzing a claim under the Due Process Clause of the Fourteenth Amendment, we must answer two questions: first, whether plaintiffs were deprived of a protected property interest, and if so, what process was due them in connection with that deprivation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422,

428 (1982); *Somerset House, Inc. v. Turnock*, 900 F.2d 1012, 1015 (7th Cir. 1990). The district court found that the foster care benefits here are a species of property that is protected under the Constitution, and the State does not seriously contest that conclusion. Entitlements to a broad range of health and welfare benefits have been considered as "property" under the Due Process Clause. *See, e.g., Atkins v. Parker*, 472 U.S. 115, 128 (1985) (food-stamp benefits); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (disability benefits); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits). The Director has offered no meaningful distinction between the benefits at issue in the cited cases and the foster care benefits that concern us here. Perceiving no distinction ourselves, we agree with the district court that foster care benefits are property for purposes of the Fourteenth Amendment.

The Director nonetheless contends that plaintiffs lack a protectable interest in that property because they have no legitimate claim of entitlement to foster care benefits after the effective date of HMR Reform. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), the Court explained that before an individual will be deemed to have a property interest in a benefit, he must show "more than an abstract need or desire for it. . . . He must, instead, [establish] a *legitimate claim of entitlement to it*." (Emphasis added). Such a legitimate claim of entitlement, moreover, is "defined by existing rules or understandings that stem from an independent source such as state law." *Id.; see also Easter House v. Felder*, 910 F.2d

1387, 1395 (7th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1067 (1991). The Director does not contest that plaintiffs had a legitimate claim of entitlement to foster care benefits under Illinois law prior to the implementation of HMR Reform. He maintains, rather, that their interest cannot be judged under prior law, but only as of the July 1, 1995 effective date of the reforms. The Director argues that because the plaintiff children reside in homes that currently are unlicensed, they lack a legitimate claim of entitlement to foster care benefits under HMR Reform. Effectively, then, the Director is arguing that plaintiffs lack a protectable property interest because the State of Illinois eliminated any entitlement they may have had when it reformed its foster care system.

But that tautological argument misunderstands the due process jurisprudence of this court and the Supreme Court. Once a property interest has been created by a state, that interest may subsequently be eliminated, but only pursuant to constitutionally adequate procedures. *See Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); *Logan*, 455 U.S. at 432. A state, in other words, may not defend against a due process claim, as the Director does here, by arguing that the plaintiff now lacks a protectable property interest by virtue of the very state action the plaintiff has challenged. *See Bennett v. Tucker*, 827 F.2d 63, 73 (7th Cir. 1987) ("a state may not deprive an individual of his or her property interest without due process, and then defend against a due process claim by asserting that the individual no longer has a property interest."). The Supreme

Court made a similar point in *Logan v. Zimmerman Brush Co.*, *supra*. There, the Court rejected the theory that a state legislature, as the creator of an entitlement, can also establish the procedures under which that entitlement can be forever lost. 455 U.S. at 431-32. The required procedures are a matter of federal law, the Court said, which "'are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'" *Id.* at 432 (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)). Any other rule, the Court explained, "would allow the State to destroy at will virtually any state-created property interest." *Id.* Thus, once a state has created a property interest, the adequacy of the procedures employed to deprive an individual of that interest must be judged in constitutional terms. *Id.; see also Vitek*, 445 U.S. at 490-91. Plaintiffs therefore have a legitimate claim of entitlement to the foster care benefits they were receiving prior to the implementation of HMR Reform, and we must determine whether the procedures employed to deprive them of that interest were constitutionally adequate.

The Director's argument regarding the second aspect of our inquiry is more powerful. The Director contends that even if these plaintiffs have a protectable property interest, the legislative process that led to the elimination of their benefits provided all the process that was due. *See Atkins v. Parker*, 472 U.S. 115 (1985).

*Atkins* involved a congressional amendment to the Food Stamp Act that reduced the percentage of earned income that could be deducted in determining eligibility for program participation. Because the amendment effectively increased the income reported by nearly all participating households, it "caused a reduction of benefits in varying amounts, or a complete termination of benefits, for families whose income placed them close to the border between eligibility and ineligibility." 472 U.S. at 118. When the State of Massachusetts attempted to implement the change, its food-stamp recipients argued that the State had provided them with deficient notice and had violated their due process rights by failing to apprise each household of the amendment's particularized effect. Although the lower courts agreed, the Supreme Court reversed, concluding that a particularized notice was not required because the legislative process provides all that is due when the benefit levels of a food-stamp recipient are so adjusted. *Id.* at 130; *see also Logan*, 455 U.S. at 432-33 *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). The Director contends that this case which also involves a substantive change to the scope of a welfare benefit program, is indistinguishable from *Atkins*. According to the Director, then, *Atkins* compels the conclusion that the legislative process satisfied the State's Fourteenth Amendment responsibilities.

The district court distinguished *Atkins*, however, by focusing on the Supreme Court's observation that the Massachusetts legislative initiative applied across-the-board and did not involve

"the procedural fairness of individual eligibility determinations." *See Atkins*, 472 U.S. at 129. The district court emphasized that plaintiffs do not challenge the substance of the reforms adopted by the state legislature; indeed, they readily concede that the Illinois General Assembly may restrict foster care benefits to children in licensed homes. Plaintiffs, who all were receiving foster care benefits prior to the implementation of HMR Reform, challenge only the State's failure to provide them an opportunity to qualify under the new system before their benefits are eliminated. (*See* Dist. Ct. Mem. Op. at 31.) The district court believed that *Atkins* did not control plaintiffs' claim to individual determinations of eligibility for continued benefits under the altered program.

The Director contests this distinction, insisting that the plaintiffs in *Atkins* also sought individual determinations about the effect of a legislative change. Plaintiffs emphasize, however, that because *Atkins* involved an across-the-board change in the method of computing income, no individual eligibility determination could prevent or alter the reduction in benefits occasioned by the legislation. Even so, food-stamp recipients affected by the change could request a hearing and have their benefit levels frozen in the interim. 472 U.S. at 128, 131 n.35. Here, by contrast, HMR Reform merely adds an additional eligibility requirement (licensure) that most if not all approved and preapproved homes could meet if given an opportunity to do so. Plaintiffs therefore argue that whether or not a particular household can satisfy the additional requirement, and thereby

retain existing benefits, requires an "individual eligibility determination" under *Atkins*.[14]

Plaintiffs' argument finds support in the Ninth Circuit's recent decision in *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995). There, the Chairman of the Samish Indian Tribe argued that the federal government violated the due process rights of

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[14] Plaintiffs therefore distinguish the many cases that have applied *Atkins* to legislative changes that eliminate or fundamentally alter a benefit system from those that add an additional eligibility requirement that current recipients are capable of meeting through further action. In each of the cited cases, as in *Atkins*, there was no action an affected individual could take to avoid the impact of the challenged legislation. Hence, there was no "individual eligibility determination" to be made. *See, e.g., Story v. Green*, 978 F.2d 60, 63 (2d Cir. 1992) (New York's repeal of exemption previously enjoyed by disabled veterans from a city's regulation of street peddling); *Rosas v. McMahon*, 945 F.2d 1469, 1475 (9th Cir. 1991) (amendment that increased the types of income to be included in determining eligibility for AFDC program); *Hoffman v. City of Warwick*, 909 F.2d 608, 619-20 (1st Cir. 1990) (repeal of state statute granting enhanced seniority to returning war veterans); *Slaughter v. Levine*, 855 F.2d 553 (8th Cir. 1988) (amendment providing that a family receiving nonrecurring lump-sum income (*e.g.*, an inheritance) is ineligible for AFDC benefits for the number of months that income would satisfy the family's standard of need); *Oliver v. Ledbetter*, 821 F.2d 1507, 1515-16 (11th Cir. 1987) (new regulation requiring that Old Age, Survivors, and Disability Insurance benefits received by one child must be included in calculating, for AFDC eligibility purposes, available income of co-resident sibling); *Gattis v. Gravett*, 806 F.2d 778, 780-81 (8th Cir. 1986) (amendment withdrawing "persons holding the rank of major and above" from personnel covered by state civil service provisions); *Frock v. United States R.R. Retirement Bd.*, 685 F.2d 1041 (7th Cir. 1982) (statute eliminating right to receipt of dual benefits under two federal programs), *cert. denied*, 459 U.S. 1201 (1983).

Tribe members when it ceased paying certain benefits on the ground that theirs was not a federally-recognized tribe. The federal-recognition requirement had been added by Congress in the early 1970s, when individual members of the Samish Tribe were already receiving federal benefits. 64 F.3d at 1269, 1274. The Tribe argued that the government could not eliminate the benefits of its individual members on this ground without providing a hearing to determine whether the Samish Tribe met the requirements for federal recognition. The Ninth Circuit noted that under *Atkins*, the legislative process generally provides all the process that is due when Congress alters the eligibility criteria for federal programs. *Id.* at 1273. Yet because Congress had only "narrowed eligibility for fundamental health and welfare benefits by conditioning eligibility on tribal recognition," the Ninth Circuit held that "the due process clause requires a meaningful hearing to determine whether those previously eligible can meet the new and narrowed requirements." *Id.* The protections of the Due Process Clause would be seriously impaired, the court observed, if the government were allowed "to cut off benefits without a hearing by creating new eligibility requirements and then summarily holding that current benefit recipients do not meet the new requirements." *Id.* (internal quotation omitted). Thus, once "Congress determined that tribal recognition was a prerequisite to benefits previously received on an individual basis, due process required the agency charged with administration of the requirement to afford a meaningful

hearing for those who would be deprived of benefits." *Id.* at 1274.

We find the circumstances here to be virtually indistinguishable from those in *Greene*. The plaintiffs here, like the individual Samish Tribe members in *Greene*, were receiving government benefits prior to a legislative change that imposed a new eligibility requirement. The effect of that change, both here and in *Greene*, was to eliminate (at least temporarily) the benefits of current recipients while they attempted to satisfy the new requirement. Although the Illinois General Assembly was as free as Congress to alter its benefit program by adding a new eligibility requirement, we agree with the Ninth Circuit that the Due Process Clause does not permit the State to withhold benefits without determining whether current recipients can meet the new requirement. *See Greene*, 64 F.3d at 1273. Just as the individual Tribe members in *Greene* were entitled to a hearing on the federal recognition question before the government could eliminate their benefits, plaintiffs here are entitled to a DCFS determination on the licensing question before the Director may deprive them of foster care benefits. The fact that the plaintiff children currently reside in homes that are not licensed is not controlling, just as the lack of federal recognition for the Samish Tribe did not control the analysis in *Greene*. In both cases, due process requires that the governmental agency provide current recipients the opportunity to establish eligibility under the new standards *before* their benefits may be eliminated. *Id.* at 1274. That is particularly true in this case, where the district court

found as a factual matter that DCFS is primarily responsible for the fact that plaintiffs currently reside in unlicensed relative homes.

We similarly agree with the Ninth Circuit that *Atkins* does not control in these circumstances. The Court in *Atkins* was careful to distinguish the legislative change there from one involving individual determinations of program eligibility. *See* 472 U.S. at 129. Indeed, the Court indicated that its conclusion would be different if the benefit reductions "were based on individual factual determinations, and notice and an opportunity to be heard had been denied." *Id.* at 131 n.35. There was no such factual determination in *Atkins* because the statutory amendment only required a simple calculation of household income under a new formula based on a static set of facts. That is not the case here, however, because HMR Reform merely imposes an additional eligibility requirement, which necessarily requires the State to determine whether existing recipients can meet the new requirement. Rather than affording plaintiffs that opportunity prior to terminating their benefits, DCFS made the blanket determination that all approved and preapproved relative homes do not satisfy the new requirement because they currently are unlicensed. *Cf. Greene*, 64 F.3d at 1273. Yet many of the affected homes could satisfy the new requirement if given an adequate opportunity. Indeed, many already have been approved by the State as meeting its licensing standards. They did not take the additional steps necessary to obtain a license only because the absence of a license had no effect on the foster care

benefits of resident children. We therefore hold that if a currently unlicensed home submits a timely license application, the Director may not terminate the benefits of resident children until DCFS has rendered a decision on the application. *See Greene*, 64 F.3d at 1273-74; *cf. Atkins*, 472 U.S. at 128, 131 n.35 (current benefit levels frozen if food-stamp recipient requested individual hearing).

Illinois has treated approved and preapproved relative homes differently in implementing HMR Reform, providing a transition process (albeit attenuated) to children in approved but not preapproved homes. Because children in both types of homes were eligible to receive benefits under Illinois law prior to HMR Reform, however, and may be equally capable of meeting the new licensing requirement, children in both types of homes are entitled to the same due process protections. We in any event conclude that the process provided to homes in both categories is constitutionally deficient.

First, HMR Reform provides a process under which approved homes may attempt to become licensed while resident children retain their former benefits. That process is fundamentally flawed, however, in that it sanctions the elimination of benefits on a specified date even where a home has submitted a timely license application and the Department has yet to render a decision. The Due Process Clause requires at the very least that benefits not be terminated unless and until DCFS considers and denies the application. *See Logan*, 455 U.S. at 434-35; *Penn Cent. Corp. v. United States R.R. Vest Corp.*, 955 F.2d 1158,

1161-62 (7th Cir. 1992) (due process rights of railroad violated where only available predeprivation process could not provide effective relief before the property interest would be lost); *see also Carey v. Quern*, 588 F.2d 230, 232 (7th Cir. 1978) ("due process requires at least that the assistance program be administered in such a way as to insure fairness and to avoid the risk of arbitrary decision-making."). We agree with the district court, then, that the benefits of children in approved homes may not be eliminated unless DCFS has processed and denied, after adequate consideration, the license applications of the homes in which they reside.

Children in preapproved homes are provided even less protection under HMR Reform. Indeed, because no transition process was provided to these children, the Director eliminated their benefits in July of this year, after enforcement of the district court's injunction was stayed. But as explained above, the Due Process Clause requires that like approved homes, preapproved homes be provided the opportunity to have a license application considered and determined on its merits before the benefits of resident children may be eliminated. The Director has therefore violated the due process rights of these children by discontinuing their benefits without providing such an opportunity.

*C. Relief*

To remedy the violations it identified, the district court first enjoined the Director from terminating the foster care benefits of children in approved and preapproved relative homes

until it had provided those homes an opportunity to have a license application determined on its merits. The district court intends to require, moreover, that DCFS provide to relative caregivers an additional notice of the changes effected by HMR Reform and to include a license application with that notice. Relative caregivers would then be given thirty-five days from the date of mailing to submit the application, with resident children retaining their benefits until the Department renders a decision. The court's order would also require the Director to make a caseworker available for questions and to provide other assistance to relative caregivers.[15] The Director maintains that the details of this injunction violate principles of comity and federalism and that he, and not the district court, should get first crack at implementing HMR Reform within the parameters of the Constitution and federal law.

It is true that in any given situation, there may be more than one permissible method of remedying a constitutional

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[15] As far as we can tell, the district court intends these procedures to apply to approved and preapproved relative homes alike. We are unsure that further notice is required for approved relative homes, however, as they already were notified of the transition process available to them and were provided with a license application. Indeed, the Director's counsel told us at oral argument that by July 1, 1996, approximately ninety percent of approved homes had applied to be licensed. We also did not understand plaintiffs to have argued below that the notice provided by the Department to approved homes was inadequate. Because the notice requirement of the district court's injunction will in any event be stricken for the reasons explained in the text, we shall leave resolution of this issue to the parties and the district court.

violation, whether it arises under the Due Process or the Supremacy Clause. *See Jefferson v. Hackney*, 406 U.S. 535, 546-47 (1972); *Jenkins v. Bowling*, 691 F.2d 1225, 1234 (7th Cir. 1982). The district court has articulated what it considers to be the minimum relief necessary to satisfy due process and the 1976 judgment. (Dist. Ct. Mem. Op. at 37.) As a result of this appeal, however, the district court has not yet entered a final decree, and before doing so, it intended to consider the Director's objections to the relief it had proposed. (*Id.* at 38.) Although the requirements of the district court's order strike us as reasonable, at least as applied to preapproved homes, we agree that the Director should be afforded the first opportunity to propose a constitutional transition procedure. *See Pennington v. Didrickson*, 22 F.3d 1376, 1388 (7th Cir. 1994) (task of federal courts is to determine whether state statutory scheme conflicts with the Constitution or federal law, and not to mandate a more compatible alternative), *cert. denied*, 115 S. Ct. 613 (1994); *Jenkins*, 691 F.2d at 1233-34. The federal courts need only at this point decree that the current implementation plan is invalid and that the Director may not eliminate the foster care benefits of children in relative homes until he has provided those homes an adequate opportunity to become licensed. *See Association of Community Org. for Reform Now* (ACORN) v. Edgar, 56 F.3d 791, 797-98 (7th Cir. 1995); *Jenkins*, 691 F.2d at 1234. The district court will of course ensure that any alternative plan is consistent with our decision today.

*D. Plaintiffs' Cross-Appeal*

Plaintiffs have cross-appealed from the district court's refusal to require the Director to permit administrative appeals from adverse licensing decisions. In refusing to grant this request, however, the district court did not consider the issue on its merits, noting instead that the information provided by the parties to date was insufficient to enable the court to reach a definitive conclusion on the issue. The court therefore expressly limited the scope of its June 30, 1995 opinion and order to the legality of the transition process without deciding whether administrative appeals were in fact available under HMR Reform or were required as a matter of law. (*See* Dist. Ct. Mem. Op. at 25-26.) Although we have jurisdiction pursuant to 28 U.S.C. §1292(a)(1) over an appeal from an order denying an injunction, we believe the administrative appeal issue must be developed further in the district court, and decided on the merits there, before we should consider it on appeal. *See, e.g.*, Circuit Rule 50 (requiring district court to provide its reasons when entering an appealable interlocutory order). At present, there is nothing in the record to establish definitively whether or not the Director has provided all plaintiffs with the right to appeal an adverse licensing decision and whether he intends to continue to pay benefits during the pendency of such an appeal. The district court also has expressed no opinion on whether appeals and continued benefits are required under the Social Security Act or the Due Process Clause. Plaintiffs should further develop this issue before the

district court and obtain a definitive ruling on the merits there before bringing the issue to this court.

## III. CONCLUSION

We agree with the district court that Illinois' transition to HMR Reform violates the due process rights of children residing in approved and preapproved relative homes. The transition also violates paragraph four of the 1976 judgment by denying benefits to children in approved relative homes. Plaintiffs are therefore entitled to an injunction that prohibits the Director from terminating their foster care benefits until he has provided them with an adequate opportunity to have a license application determined on its merits. The district court must nonetheless strike those portions of its order mandating an alternative means of implementing HMR Reform in order to permit the Director to propose his own procedure. With that exception, the injunction challenged in the Director's appeal is affirmed. We similarly affirm, at this time, the order denying a further injunction that is challenged in plaintiffs' cross-appeal. The parties shall each recover the costs they incurred in defending the other's appeal. The stay entered on October 10, 1995, is dissolved.

IT IS SO ORDERED.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# United States Court of Appeals

## *FOR THE SEVENTH CIRCUIT*
## *CHICAGO, ILLINOIS 60604*

January 17, 1996

***Before***

**Hon. Harlington Wood, Jr., Circuit Judge**

**Hon. Ilana Diamond Rovner, Circuit Judge**

**Hon. Terence T. Evans, Circuit Judge**

No. 95-2575 & 95-2813

| | | |
|---|---|---|
| MARCEL YOUAKIM, | ] | Appeal from the United |
| LINDA YOUAKIM, individually, | ] | States District Court |
| and as foster parents, | ] | for the Northern |
| and TIMOTHY ROBERTSON, | ] | District of Illinois |
| and all others similarly situated, | ] | Eastern Division. |
| | ] | |
| Plaintiffs-Appellees, | ] | |
| | ] | |
| v. | ] | No. 73 C 635 |
| | ] | |
| JESS MCDONALD, Director, | ] | |
| Illinois Department of Children | ] | |
| and Family Services, | ] | |
| | ] | **John A. Nordberg,** |
| Defendant-Appellant. | ] | Judge. |

## ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendant-appellant on December 15, 1995, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is, hereby DENIED. The stay entered on December 21, 1995 is dissolved.

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Honorable Frank H. Easterbrook did not participate in the consideration of this petition.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| MARCEL YOUAKIM, et al., | ] | |
| | ] | |
| *Plaintiffs,* | ] | |
| | ] | |
| v. | ] | No. 73 C 635 |
| | ] | |
| | ] | Judge John A. Nordberg |
| JESS MCDONALD, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES,[1] | ] | |
| | ] | |
| *Defendant.* | ] | |

## MEMORANDUM OPINION AND ORDER

On June 6, 1995, Governor Edgar signed P.A. 89-21, which was passed by the Illinois General Assembly on May 26, 1995. P.A. 89-21 includes statutory amendments authorizing, directing

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), Jess McDonald, the Director of the Illinois Department of Children and Family Services, has been substituted as the Defendant in this suit for Jerome Miller, the Director of the Department of Children and Family Services at the time this suit was originally brought.

and implementing the Illinois Department of Children and Family Services' ("DCFS's") Home of Relative Reform Plan ("HMR Reform"). Plaintiffs, a class comprising of related foster parents and related foster children claiming to be eligible for equal foster care payments and ancillary benefits pursuant to Title IV-E of the Social Security Act, claim that the transition process from the current foster care regime to HMR Reform violates the express provisions of the Judgment Order entered in this case on August 25, 1976, Title IV-E itself and the Due Process Clause of the Fourteenth Amendment. Plaintiffs have filed a Motion to Adjudicate Director McDonald in Civil Contempt of the 1976 Order and for Remedial Sanctions and a Supplemental Motion for relief pursuant to 28 U.S.C. §§ 2201, 2202.

In light of the July 1, 1995 effective date of the HMR Reform legislation, the Court has held itself and the parties to a demanding schedule in this adjudication. Because the Court believes that it is important to have a ruling in this case before the legislation goes into effect, the Court has not had the opportunity to produce a full Memorandum Opinion and Order, but seeks to articulate in as much written detail as possible the basis for the findings of fact and conclusions of law that underlie its decision.[2]

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[2] The parties and the Court have been fortunate to have outstanding counsel working on this case. The attorneys demonstrated zealous advocacy and extraordinary professional skill. The Attorneys have prepared and presented in a remarkably short period of time a complete factual and legal presentation of their respective positions. The lawyers also demonstrated laudable coopera-

(continued...)

The Court has reviewed the motions submitted and the arguments of counsel, the exhibits received into evidence, all the testimony submitted to the Court in written and oral form, including written and oral direct, cross and re-direct examinations, detailed notes taken during the evidentiary hearing by the Court, the proposed findings of fact and conclusions of law submitted by the parties, the brief submitted by the amici curiae, the stipulations of fact submitted by the parties and a tape recording of the entire hearing. Where necessary, the Court made credibility determinations based on the witness' intelligence, ability and opportunity to observe, their memory and manner while testifying, any interest, bias or prejudice they may have had, and the reasonableness of their testimony in light of all the evidence presented in the case. The Court held an evidentiary hearing on June 15 and 16, 1995.

## BACKGROUND

Some explanation of the background of the case is required to understand the arguments of the parties.

Before the initial litigation in this case, many years ago, the State of Illinois defined the term "foster family home" as "a facility of child care in residences of families who receive no more than 8 children unrelated to them . . . for the purpose

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[2](...continued)
tion, particularly in the production and presentation of the exceptional Stipulations of Uncontested Fact, which the Court has relied on in making many of its findings.

of providing family care and training for the children on a full time basis." Miller v. Youakim, 440 U.S. 125, 130 (1979). Thus, an individual providing family care and training to children related to the individual did not maintain a foster family home. Such children and caregivers were therefore ineligible for the federal foster care payments which were available through the states to foster family homes, even though a child would have been eligible for such payments if the child had been placed in the home of a non-relative. In 1976, a three-judge panel held that Illinois's practice of excluding relatives from the definition of foster family home conflicted with sections 601 and 608 of the Social Security Act and was therefore invalid under the Supremacy Clause of the United States Constitution. Miller v. Youakim, 431 F. Supp. 40, 45 (N.D. Ill. 1976).

As part of its ruling, the Court entered a Judgment Order. The Order enjoined the State of Illinois from enforcing any law or administrative policy or procedure insofar as it excluded any child or foster care provider from eligibility in the Title IV-E[3] program or denied the full benefits available under that program on the basis of a familial relationship between the provider and the child. Judgment Order, ¶ 4(a). The Order also required that Illinois pay full Title IV-E benefits to related foster children and parents if they were eligible to receive them. The District

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[3] At the time of the Order, Title IV-E did not exist. Foster care payments were made pursuant to the Aid to Families with Dependent Children program. Accordingly, the 1976 Judgment Order refers to AFDC-F payments. These payments are the equivalent of those currently provided under Title IV-E.

Court's conclusion that the Illinois statute violated the Supremacy Clause was affirmed by the Seventh Circuit, 562 F.2d 483 (7th Cir. 1977), and the Supreme Court, 440 U.S. 125 (1979), both with written opinions.

The instant litigation involves a dispute regarding the requirements of the 1976 Judgment Order. Plaintiffs claim that Defendant disfavors relative foster children and caregivers in the transition process between the old foster care system and HMR Reform. Plaintiffs contend that the transition process[4] established by the legislation violates the 1976 Order, the provisions of Title IV-E of the Social Security Act and the Due Process Clause of the Fourteenth Amendment. However, Plaintiffs do not challenge the authority of the State of Illinois to enact HMR Reform or any substantive portion of that legislation.

## STIPULATED FACTS

DCFS is the Illinois state agency charged with investigating allegations of child abuse and neglect throughout Illinois and caring for children and families who are the victims of child

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[4] For the purposes of this Opinion, the Court defines "transition process" as the period between the effective date of HMR Reform and the point in time at which all applications for licensure from currently unlicensed foster caregivers have been decided by DCFS.

abuse and neglect.[5] If DCFS determines that a child is in imminent risk of harm or cannot be safely maintained with her family, DCFS make take immediate emergency custody of the child. Within two days of taking emergency protective custody, a hearing must be held in juvenile court to determine whether the child should be made a ward of the court and placed in DCFS guardianship. Children in the custody or guardianship of DCFS are placed in substitute care placements, including relative homes, non-relative homes, group homes, or institutions.

Children may be placed with relatives immediately by DCFS, even though the relative home is neither licensed nor approved as a foster home, as long as the relative home passes an initial "safety check." The Court will refer to this situation as placement in a "pre-approved" home.[6] In contrast, a child may be placed in a non-relative home only if that home has been licensed. Prior to HMR Reform, DCFS provided children placed in pre-approved homes the full foster care assistance of approximately $350 per child per month, despite the fact that the federal government did not reimburse Illinois under Title IV-E unless a related child was placed in a licensed or approved home. 42 U.S.C. § 672(c). Thus, from the point of view of the related foster care provider, there was no financial

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[5] This suit names Director McDonald in his official capacity only and is therefore merely a suit against DCFS itself. See Hill v. Shelander, 924 F.2d 1370, 1372 (7th Cir. 1991).

[6] The procedures constituting the initial safety check are listed at 89 Ill. Admin. Code § 335.202.

incentive to apply to be approved or licensed under the pre-HMR Reform foster care system. In addition, the difference between pre-approved, which means that the home is approved to take the child but not for reimbursement under federal programs, and approved, meaning that the State of Illinois was eligible to receive federal reimbursements under Title IV-E of the Social Security Act, was a distinction that understandably escaped related caregivers. The bottom line, however, is that many caregivers do not know whether or not they are "licensed" or "approved" as opposed to "pre-approved," a distinction which affects their rights in the transition to HMR Reform.[7]

Children in DCFS custody or guardianship are assigned a case worker, who may be a DCFS employee or may be assigned through a private child welfare agency, such as Catholic Charities. If a child's case is assigned to one of the sixty-seven private welfare agencies doing work for DCFS, the agency not only provides a caseworker to manage the case, but also is responsible for shepherding the family through the licensure or approval process.[8] As of April 30, 1995, 47,007 children were in foster care via DCFS placements. Private welfare agencies managed 31,596 of those children.

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[7] See, e.g., Grimes Direct, p. 9; Campbell Direct, p. 3; Crawford Direct, p. 3; Sumner Direct, p. 7.

[8] Some private welfare agencies are "approval only," meaning that DCFS has not granted them the authority to participate in the licensing process at all. Foster caregivers assigned to those agencies therefore had virtually no opportunity to be licensed.

Prior to HMR Reform, foster children in Illinois who lived in private homes were categorized by the State in one of three groups. The children either lived in a licensed home, an approved home,[9] or a pre-approved home, with the pre-approved category being divided between those with applications for approval pending and those without. All children residing with non-relatives must live in licensed homes, as an unrelated foster parent could not, and can not under HMR Reform, care for a child unless the foster home has been licensed. The "approved" category was created in 1986, in part to make it easier for DCFS to place children in relative homes. As the Court has noted, DCFS may place children in the home of a related person immediately after the child is removed from her original home so long as the relative satisfies an initial safety check. Relatives may then apply to have their homes approved or licensed.

A summary of the status of the 26,368 children in DCFS custody residing in relative homes as of April 30, 1995 (of the total of 47,007 children involved with DCFS) is presented here.

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[9] The State of Illinois established the "approved" category in 1986 with the promulgation of 89 Illinois Administrative Rule 335. Rule 335 provides that the approval standards:

> are substantially the same with regard to the safety, health and welfare of children as those promulgated for licensure of unrelated foster family homes pursuant to the Child Care Act of 1969.

89 Ill. Admin. Rule 335.102. Rule 335 was abolished by the HMR Reform.

| | Approved or Licensed | Pending | No Appli-cation | Denied | Total |
|---|---|---|---|---|---|
| DCFS | 2,027 | 1,086 | 5,402 | 11 | 8,526 |
| Private Agency | 9,507 | 4,766 | 3,544 | 25 | 17,842 |
| Total | 11,534 | 5,852 | 8,946 | 36 | 26,368 |

Of the 11,534 children in the "Approved or Licensed" category, only 308 are in licensed homes. DCFS receives federal Title IV-E funds only for those children in licensed and approved homes, although DCFS has continued to pay the full foster care rate of approximately $350 per child per month to children in the "Pending" and "No Application" categories without federal assistance.

The statistics with respect to the number of relative foster care homes in each category as of April 30, 1995 are similar to those with respect to the number of children, as demonstrated by this table.

| | Approved or Licensed | Pending | No Appli-cation | Denied | Total |
|---|---|---|---|---|---|
| DCFS | 1,051 | 681 | 3,182 | 7 | 4,921 |
| Private Agency | 4,005 | 2,935 | 1,994 | 10 | 8,944 |
| Total | 5,056 | 3,616 | 5,176 | 17 | 13,865 |

Of the homes that were Approved or Licensed, only 182 were licensed. From both tables presented, it is apparent that the private agencies have done a substantially better job approving and licensing homes than DCFS (44.8% of private agency homes approved or licensed; 21.4% of DCFS homes), despite the stated DCFS policy to actively pursue approval or licensure.

Prior to HMR Reform, relatives were favored by DCFS for foster child placements. DCFS actively recruited relatives as foster care providers. In 1986, DCFS created the "approved" category, in part to make it easter for DCFS to place foster children with relative caregivers. Between the promulgation of 89 Ill. Admin. Code § 335 (establishing the approval category) and HMR Reform, DCFS's preference for relative caregivers

was consistent with State law. See 20 ILCS 505/7(b) (repealed by HMR Reform). Furthermore, to the extent DCFS encouraged relative caregivers to apply to be approved or licensed, DCFS usually encouraged the approval process, which was easier for both DCFS and the family involved.

DCFS has struggled to carry out it responsibilities to the people of Illinois, due in large part to the enormity of those responsibilities. The number of children in DCFS custody has nearly doubled in the last four years, rising from 23,700 in June, 1991 to 47,000 as of April 30, 1995. Similarly, the number of children in state custody who are placed with relative care givers increased from approximately 5,500 in June, 1988 to over 25,700 in January, 1995, an increase of 367%. According to DCFS, this astronomical growth in relative care was primarily caused by a state law which established a preference for relative caregivers (and was repealed as part of HMR Reform), a broad definition of "neglected children" which included children living with relatives in the absence of a biological parent, slower rates of discharge from relative homes and the disparity between the payments available to foster parents caring for relatives and those avaiilable to non-foster parent caregivers who relied solely on other kinds of public assistance, including Aid to Families with Dependent Children ("AFDC"). In addition, the growth in relative foster care is partially due to the fact that DCFS sought out or solicited relative caregivers.

The cost of maintaining DCFS is high, particularly because Illinois provides the full foster care rate of payment to foster children even in cases where the federal government does not

partially reimburse the State for doing so, such as in the cases where a relative cares for a child but does not maintain an approved or licensed home. Hawaii is the only other state that pays foster care rates regardless of the eligibility for Title IV-E reimbursements. DCFS estimates that the State of Illinois lost $16 million in federal funds in fiscal year 1992 due to its policies regarding relative foster care payments. As the Court has noted, much of this loss was caused by the State's inability to license or approve, and therefore qualify for Title IV-E reimbursements, many of the relative foster homes. Part of this problem is due to the fact that relative caregivers lack a financial incentive to pursue licensure or approval in the pre-HMR Reform system as their benefit remains constant regardless of their status. Part of the problem also lies with administrative difficulties at DCFS. For example, DCFS and the private agencies responsible for licensing and approval of relative foster homes have lost applications filed by some foster parents. DCFS claims to have introduced steps to increase its administrative efficiency, such as the introduction of new fingerprint reading equipment which will supposedly reduce the time it takes to consider an application for licensure, but no evidence indicating any measurable improvements was submitted to the Court.

The HMR Reform at issue in this litigation is a response to these, and other, problems. Governor Edgar first announced HMR Reform on March 1, 1995. For the purposes of this litigation, three main components of HMR Reform are critical. First, HMR Reform eliminates the "approval" category for foster family homes. Second, Illinois will no longer pay the foster

care rate to homes with applications pending. Therefore, under HMR Reform, which is effective July 1, 1995, foster children will receive foster care payments from DCFS only if they are placed in a foster family home that is licensed under the terms of the Illinois Child Care Act of 1969.[10] Third, DCFS will not provide an administrative appeal to those applicants for licensure who are rejected.

After July 1, 1995, the licensing requirements under HMR Reform are the same for relative and non-relative caregivers and slightly more stringent than those in place prior to HMR Reform. Furthermore, HMR Reform changes the prior "official" policy of requiring foster care providers to apply for approval or licensure as a condition to keeping a child.[11] Under HMR Reform, the caregiver has the option to pursue a license or not. Therefore, a caregiver who is not capable of becoming licensed may still have a child placed in this or her foster home, but the caregiver will not receive foster care payments.

Those homes that are already licensed will not have to re-apply until their current licenses expire, despite the changes

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[10] There is one exception. Relative caregivers who, as of July 1, 1995, are approved under the prior approval rules at 89 Ill. Admin. Code § 335 and have submitted an application for licensure postmarked on or before June 30, 1995, will continue to receive foster care payments until DCFS makes a decision on their application or September 30, 1995, whichever comes first.

[11] In light of the fact that the percentage of relative homes that became approved never exceeded 66%, it is clear that this policy was rarely, if ever, enforced.

in the substantive licensing requirements. Those homes that are not yet licensed, however, which are mostly relative homes, must apply for and obtain a license to preserve their foster care payments beyond September 30, 1995, or in many cases, beyond July 1, 1995. For those foster children and foster care providers who will lose foster care payments as of July 1 or September 30 due to the implementation of HMR Reform, the amount of the loss will depend on the number of foster children involved. Although foster care payments will be eliminated for all but licensed homes, the State will continue to provide assistance to unlicensed homes via the Department of Public Aid and the Aid to Families with Dependent Children programs. Because these programs utilize an "economy of scale" theory, the payments increase at a decreasing rate for each additional child involved. For example, for a single foster child in Cook County, an unlicensed relative caregiver will receive $252 per month, or 72% of the approximately $350 per month they had received as a foster parent. An unlicensed foster home with eight children (the statutory maximum) would receive $1,165 per month, or 42% of the approximately $2,800 it would have received in the foster care program.[12] Of course, a relative caregiver may

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[12] Payments made to unlicensed caregivers will be made at a level to insure that foster children in unlicensed homes receive 100% of the Department of Public Aid's "Standard of Need," which is periodically calculated. It is important to note that to reach 100% of the Standard of Need, DCFS will supplement the payments made under the AFDC program, as many children who participate solely in AFDC do not receive 100% of the Standard of Need.

receive the full foster care benefits upon receiving a license as a foster care provider. The foster care payments do not incorporate economies of scale because obtaining and maintaining a license entails significant fixed costs, including maintaining certain housing standards. According to DCFS, the additional requirements placed on licensed foster homes, including having a telephone, a satisfactory water supply, and undergoing foster care training as well as a criminal check, justify the additional payments made to licensed caregivers as opposed to those who have merely passed the safety check.

DCFS began the implementation of HMR Reform by holding briefings for agencies and advocates in March, 1995. In April, 1995, DCFS provided current relative caregivers with initial written notice of the HMR Reform Plan. On April 28, 1995, DCFS issued a second notice of HMR Reform, including an application for licensure in notices sent to approved homes and homes with applications for approval pending. On approximately June 12, 1995, DCFS issued another notice to relative caregivers. This time, however, separate notices were sent depending upon whether the home was approved, pre-approved with an application pending, or pre-approved without a pending application.[13] These three notices were the only notice of HMR Reform

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[13] It is unclear from the stipulations filed by the parties how DCFS determined whether an application was pending. The stipulation indicates that which notice was sent depended upon whether DCFS "considered" an application to be pending.

(continued...)

sent to relative caregivers. Applications for licensure were not sent to pre-approved caregivers who did not have an application for approval pending. These care givers were instructed to obtain applications from their caseworker.

Many applications for licensure filed by relative caregivers before July 1, 1995 will not be decided by September 30, 1995. As a result, many foster caregivers will lose full foster care benefits at that time. Under HMR Reform, some of those applicants, as well as some of those who lost benefits as of July 1, 1995, will lose benefits even though they satisfy the licensure requirements under HMR Reform. In such cases, DCFS will not pay benefits retroactively.

DCFS intends to notify applicants for licensure of its decision with respect to their application by mail. If an application is rejected, the notice will include a written reason for the rejection. Under HMR Reform, there is no right to an appeal of an unfavorable decision. Appeals are available in only two situations: (1) to those homes that lose benefits and claim that the loss is the result of a DCFS mistake related to whether or

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[13](...continued)

One of the elements of HMR Reform is the establishment of a definition of "pending." Previously, no official definition existed, but DCFS considered an application "pending" solely upon the submission of a written application form. Under HMR Reform, DCFS will not consider an application for licensure to be pending until certain items are submitted. In light of this new definition, the Court cannot determine whether notices were sent pursuant to the pre-HMR Reform policy, the HMR Reform definition, or some other determination of pending used exclusively for this purpose.

not the home is already licensed; and (2) to those approved homes who lose benefits and claim that the loss is the result of a DCFS mistake related to whether an application for licensure was made in time (by June 30, 1995) to preserve benefits until September 30 or until a determination by DCFS, whichever occurs earlier.

The financial implications of HMR Reform are significant. DCFS estimates that HMR Reform will result in a net savings to the State of Illinois (and net loss to benefit recipients) of $44.4 million, consisting of $60.8 million in savings at DCFS offset by $16.4 million in increased cost to the Department of Public Aid.

## ADDITIONAL FINDINGS OF FACT

In light of the nearly comprehensive nature of the factual stipulations submitted by the parties, the Court needs to make only these additional findings of fact.

First, the Court finds that prior to HMR Reform, the licensing process was not equally available to both relative and non-relative foster homes. This conclusion is supported by DCFS's admission that nine of the sixty-seven private agencies have been authorized to conduct approval only studies. Def.'s Resp. to Pl.'s Inter., p. 10. For the foster homes approved by these agencies, no opportunity for licensure was ever presented. Furthermore, because both licensed and approved homes received full foster care benefits, and because approval was less intrusive and had fewer requirements than licensing,

approval was easier for both the foster care family and DCFS staff or the private agency assigned to that family. Morsch Direct, p. 10 ("consistent with the Reid Consent Decree and [DCFS] practice, nearly all relatives were processed through the approval, rather than the licensing, process"). This finding of fact is supported by the statistical evidence. As of April 30, 1995, only 1.2% of all related children in foster care resided in licensed homes, while 42.6% of such children lived in approved homes. In addition, 22.2% of the pre-approved homes had applications for approval pending. With respect to number of homes, the evidence is similar. As of April 30, 1995, 1.3% of all homes with related children were licensed while 35.2% were approved. Homes with pending applications for approval accounted for 26.1% of the total number of homes with related children.

Second, the Court finds that DCFS will be unable to render decisions on the applications for licensure that will be pending on July 1, 1995 in time to prevent the deprivation of benefits to many applicants who satisfy the requirements for licensure. On the record before it, the Court is unable to reasonably estimate the time DCFS will need to render decisions on the applications for licensure that will be filed by relative approved caregivers as a result of HMR Reform. Plaintiff's expert, Mary Grimes, testified that it takes approximately six months to complete the licensure process. DCFS has a policy that a decision to issue a license on an application should be made within seventy-five days of the time the application is filed. However, DCFS statistics indicate that only 19.3% of all licens-

ing applications in Cook County in fiscal 1994 were licensed within seventy-five days. Pl.'s Ex. 6 at T316. In private agencies in Cook County during the same time period, 36.8% of the licensure applications were determined within seventy-five days. Pl.'s Ex. 6 at T384. Plaintiffs' witnesses testified to long time periods and various difficulties involved in processing applications. See Grimes Direct, pp. 7, 9, 20, 22-23, 25; Grimes Supp. Direct, p. 2; Stidhum Direct, p. 3; Sumner Direct, p. 6-7; Tate Direct, p. 4; Walton Direct, p. 4. The substantive requirements for licensure have not been diminished by HMR Reform. Defendant submits evidence that the process has been streamline and benefits from new technologies since the statistics provided above were developed. However, Defendant has not produced any evidence of any actual improvements in the time it takes, on average, to process an application for a license. Plaintiffs' witnesses testified to problems in obtaining licensure applications and counseling from caseworkers. Under the new HMR Reform rules, an applicant must receive six hours of foster care training, further delaying the application process. Accordingly, the Court concludes that the average period to process a completed licensure application will be in excess of ninety days.

Third, some of the relative foster children and care providers who are currently receiving full foster care benefits as approved homes or because they have applications for approval pending will lose those benefits under HMR Reform transition schedule despite the fact that they currently meet the requirements for licensure and will eventually be licensed. This conclusion is

based in large part on the definition of "approved" in 42 U.S.C. § 672(c), which defines "foster family home" as:

> a foster family home which is licensed by the State in which it is situated or has been approved, by the agency of the State having responsibility for licensing homes of this type, as meeting the standards established for such licensing.

This definition, under which the State of Illinois created the approved category in 1986, indicates that a home must meet licensure standards to be approved. Furthermore, because DCFS and the private agencies providing services to foster children and caregivers have channelled foster homes towards the approved category rather than the licensed category, the Court concludes that it is a certainty that many approved homes meet the standards for licensure.

Fourth, a substantial number of relative foster care homes that are only pre-approved will lose full foster care benefits under the HMR Reform transition schedule despite the fact that they currently meet or are able to meet the requirements for licensure and will eventually be licensed. Fifth, no non-related foster care children and caregivers who are currently receiving full foster care benefits will lose those benefits under the HMR Reform transition schedule.

## ANALYSIS

Plaintiffs argue that the transition from the pre-HMR Reform system of providing public assistance to relative foster children

and relative foster caregivers violates the Judgment Order entered in 1976 in this case, Title IV-E of the Social Security Act and the Due Process Clause of the Fourteenth Amendment. The Court will consider each argument in turn.

## I. THE JUDGMENT ORDER

As a result of the District Court's conclusion, in 1976, that Illinois' statutory definition of "foster family home," which excluded relative caregivers, was in conflict with the provisions of the federal Social Security Act, a Judgment Order was entered to provide the Plaintiffs and members of the Plaintiff class full and equitable relief. Plaintiffs now claim that HMR Reform violates that Judgment Order. For the purpose of this litigation, the operative paragraph of the Judgment Order is paragraph 4, which provides in part:

> Defendants, their agents, employees and all other persons in active concert with them are enjoined from:
>
> (a) enforcing [Illinois law] and all implementing administrative policies and procedures, insofar as they exclude from eligibility, or deny in full [Title IV-E] payments or ancillary benefits to, foster children living in foster homes maintained by related foster parents, and to these related foster parents, when such children and such parents are otherwise eligible for such payments and benefits;

> (b) failing to pay full [Title IV-E] payments to foster children living in foster homes maintained by related foster parents, and to those related foster parents, when such children and parents are otherwise eligible for such payments.

Judgment Order, ¶ 4. Plaintiffs argue that HMR Reform Plan consists of Illinois law and administrative policies and procedures that exclude relative foster children from Title IV-E benefits and deny such benefits to them on account of their relationship to their foster caregiver. Plaintiffs further argue that the Supreme Court decision in Youakim bolsters the conclusion that the State may not treat foster children differently on account of a family relationship with the foster care provider. The Supreme Court wrote, "Congress intended no distinction between related and unrelated foster homes." Youakim, 440 U.S. at 135. Therefore, the State of Illinois was precluded from establishing a more narrow entitlement to benefits than Congress had created. Id.

Defendant acknowledges that it may not distinguish between relative and non-relative foster care homes when providing benefits pursuant to a federal program. Defendant argues, however, that it is merely distinguishing between licensed homes and unlicensed homes, a line that it is unquestionably permitted to draw. Defendant argues that the language of the Judgment Order prohibits disparate treatment of related and non-related foster children only to the extent they are "otherwise eligible for benefits." Because the State has the power to determine the eligibility criteria, Defendant argues that treating non-licensed

foster homes differently than licensed foster homes is permissible under the Judgment Order. Defendant also points out that relative caregivers may apply for a license subject to the same requirements as non-relatives.

Although federal law does provide that "approved" or "licensed" homes are eligible for Title IV-E benefits, 42 U.S.C. § 672(c), witnesses for both sides testified that federal law does not require the establishment or maintenance of a category of "approved" foster homes. Thus, the State may elect not to "approve" any more foster homes without running afoul of the Judgment Order.

The situation here, however, is more complicated. In the pre-HMR Reform system, the State of Illinois created a distinction without a difference in that the distinction between a licensed home, an approved home, and a pre-approved home made no difference to the amount of funds or services a relative foster home could obtain.[14] Partially because this distinction made no difference to the funds received by the foster children and caregivers, DCFS field staff and private agency case workers advised and channelled relative caregivers towards the approval category rather than licensure. Approved homes have enjoyed full foster care benefits ever since. Essentially, DCFS, through

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[14] The Court acknowledges that the distinction between licensed or approved and pre-approved was important to the State in that federal reimbursements were available only for licensed and approved homes. The caregiver and the child, however, undoubtedly did not know of this distinction, and in any event the distinction was meaningless as they still received full foster care benefits.

HMR Reform, retroactively renders the distinction between licensure and approval, which was previously solely a matter of form, a matter of critical substantive importance. By doing so, DCFS is deliberately disfavoring relative caregivers.

Under HMR Reform, the relative caregivers are placed in an impossible situation through the actions of DCFS. They no longer qualify for benefits due to their approved status and there is simply no way that DCFS will be able to process all the applications for licensure in time to prevent the loss of substantial foster care benefits to these homes. Because they face a loss of foster care benefits which they are powerless to prevent, relative caregivers are disfavored when compared to non-relatives under HMR Reform. Non-relatives, who were not subject to DCFS's channelling practice, do not face this difficulty. To the contrary, they were required to be licensed from the start. Both relative and non-relative caregivers will remain responsible for the care of the children placed in their homes, although the relative caregivers will be expected to provide this same care at a lower rate of compensation.[15] To

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[15] This aspect of HMR Reform raises fundamental issues of fairness as well as issues of disparate treatment. DCFS contends that the rate of foster care payments is set partially to compensate foster care providers for the fixed costs of meeting the licensure requirements. For those relatives who received full benefits as approved homes and have applied for licenses in response to HMR Reform, full foster care payments will be denied them while DCFS processes their application. During this period, the family will be required to continue to incur the fixed costs of maintaining a licensed facility in order to keep their application valid, even though the higher foster care payment will not be available to defray these costs.

the extent DCFS argues that the dilemma is caused by the relative's failure to obtain a license, DCFS has caused that state of affairs. Because DCFS is required by the Judgment Order to refrain from discriminating against relative foster children and caregivers on the basis of the familial relationships between them, DCFS has a concomitant duty to insure that HMR Reform does not create disparate treatment of relative foster children based on prior policies and practices of DCFS itself.

The Court concludes that the combination of the DCFS practice of channelling relative caregivers into the approved (or pre-approved), rather than licensed, status and the elements of HMR Reform which place critical importance on the possession of a license disfavor relative caregivers irrespective of their eligibility for full foster care benefits. The Court further concludes that the State of Illinois and DCFS have not taken any action to mitigate the discriminatory effect HMR Reform will have on relative children and caregivers. Accordingly, relief is appropriate under the Judgment Order.

Although the Court finds that HMR Reform violates the Judgment Order entered in this case, it does not find the Director in civil contempt. The standard for civil contempt in the Seventh Circuit is high. In D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455 (7th Cir. 1993), the court explained that a party may be held in contempt only for behavior which is clearly prohibited by a court order "within its four corners." Id. at 460 (quoting United States v. ITT Continental Baking Co., 420 U.S. 223, 237 (1975)). The violation of the Judgment Order in this case arises over a period of years from the combination of prior DCFS

practices and the HMR Reform legislation, neither of which independently violated the Judgment Order. As a result, the Court is unwilling to find the Director in contempt for the result of independent actions by his department and the State of Illinois. This is not to say that the Court should not grant relief to Plaintiffs. Paragraph 12 of the Judgment Order states, "This Court shall retain continuing jurisdiction over this action." Judgment Order, ¶ 12. Thus, the Court still has the authority to enforce the Judgment Order to prevent this discrimination. The Court will discuss the appropriate relief to which Plaintiffs are entitled later in this opinion.

## II. TITLE IV-E

Plaintiffs argue that the transition process violates Title IV-E of the Social Security Act and its implementing regulations. Plaintiffs argue that, because Title IV-E allows full foster care payments to homes that are either "licensed" or "approved," the State may not disfavor those homes which are approved rather than licensed. Plaintiffs contend that DCFS has created a disparate burden on relative foster homes by eliminating the approval category, thereby automatically depriving the vast majority of relative caregivers of Title IV-E funds. As the Court has already explained in its discussion of the Judgment Order, DCFS has treated relative caregivers less favorably than non-relative caregivers by channelling relative caregivers towards the approved category and then eliminating it. Full relief arising from this disparate treatment is available as a result of the

Court's conclusion that HMR Reform violates the Judgment Order.

To the extent Plaintiffs object to provisions of HMR Reform other than the transition process under Title IV-E, including the right of appeal from unfavorable licensing decisions, the Court considers those arguments to attack the substance of HMR Reform. The issues before the Court in this litigation are whether the transition process itself is unlawful. The Court issues no opinion with respect to the other provisions of HMR Reform. Specifically, the Court has not had sufficient briefing of Plaintiffs' argument regarding the availability of appeals from the denial of licenses under HMR Reform, in which they rely on a letter dated June 15, 1995 from Kay Willmoth, the Assistant Regional Administrator for Family Security for the Department of Health and Human Services. Willmoth states that "it is our view" that children living in homes that are pre-approved are entitled to hearings under section 671(a)(12) regarding the substance of the licensure decision as well as to determine whether their foster parents' application for licensure have been processed with reasonable promptness. Additionally, Willmoth states that children living in approved homes are entitled to the aforementioned hearings as well as the continuation of benefits while their licensure application is pending. In light of the date of Willmoth's letter, the parties have not had a complete opportunity to present argument on this point. Accordingly, the Court does not feel that it has enough information to rule on this issue.

The Court expressly limits the scope of its opinion in this matter to the legality of the transition process. Specifically, the Court limits its analysis to the questions of whether the transition process treats relative caregivers the same as non-relatives and whether the procedures by which the State intends to deprive relative caregivers of foster care benefits are constitutionally adequate.

## III. DUE PROCESS

Plaintiffs argue that the transition from the pre-HMR Reform system to the HMR Reform systems deprives them of property without due process of law. Plaintiffs contend that they have a property interest in the foster care payments which they received prior to HMR Reform. Additionally, they claim that the State may not deprive them of those benefits without granting them the opportunity to establish that they will qualify for the same benefits under the new HMR Reform program. Defendant argues that Plaintiffs were granted all the process they are entitled to by the passage of P.A. 89-21 by the Illinois General Assembly.

The Due Process Clause of the Fourteenth Amendment provides that no State shall deprive any person of property without due process of law. U.S. Const. amend. XIV. Therefore, in cases asserting the unlawful deprivation of property, the Court must complete a two-part inquiry. First, was the claimant deprived of a protected property interest and,

if so, what process was his due. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

Foster care benefits, like the food stamp benefits at issue in Atkins v. Parker, 472 U.S. 115 (1985) and the welfare benefits at issue in Goldberg v. Kelly, 397 U.S. 254 (1970), "are a matter of statutory entitlement for persons qualified to receive them." Goldberg, 397 U.S. at 262-63. Such entitlements are property which is protected by the Due Process Clause. Id. Accordingly, the procedures that are employed in determining whether an individual may continue to participate in the statutory program must comply with the commands of the Constitution. Atkins, 472 U.S. at 128 (citing Goldberg, 397 U.S. at 262-63). Neither party contests that the benefits themselves are constitutionally protected property.[16]

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[16] Defendant argues that Plaintiff has no constitutionally protected interest in a transition period or in a "reasonable eligibility process" because an interest in process alone is not protected by the Fourteenth Amendment. It is true that the Due Process Clause does not recognize an interest in process as property. Doe v. Milwaukee County, 903 F.2d 499, 502-03 (7th Cir. 1990). However, contrary to Defendant's argument, Plaintiffs do assert a protected property interest here. Plaintiffs argue that they have an interest in the continuation of the foster care payments that were being made to them under the prior system until they have a fair and reasonable opportunity to apply for these same benefits under HMR Reform. Plaintiffs claim an interest in the dollars they were receiving prior to HMR Reform and in the continuation of those benefits under HMR Reform. Welfare benefits are property for the purpose of the Fourteenth Amendment. Goldberg v. Kelly, 397 U.S. 254 (1970). The foster care payments here are indistinguishable from the welfare benefits in Goldberg for the purpose of

(continued...)

Defendant asserts, citing Atkins, that the Illinois legislature provided all the process that was due for a change in the scope of the foster care public assistance in Illinois. It is undisputed that a legislature may reduce in mass the benefit levels provided to a welfare recipient without violating the Due Process Clause. Logan, 455 U.S. at 432-33 (citing cases). In such cases, the legislative determination provides all the process that is due. Id. at 433. In Atkins itself the Supreme Court considered whether recipients of public assistance had a constitutional right to process before an amendment reducing the level of their benefits could be implemented. Congress had increased the percentage of an applicant's income that would be considered by the Department of Agriculture when calculating the amount of food stamp assistance to which the applicant was entitled. Atkins, 472 U.S. at 117-18. Plaintiffs argued that they had a constitutional right, pursuant to the Due Process Clause, to

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[16](...continued)
this analysis.

Defendant suggests that Plaintiffs have not been deprived of their interest in the foster care payments because they can apply for a license and, if successful, obtain full foster care benefits. However, as the Supreme Court made clear in Logan, "[w]hile the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Logan, 455 U.S. at 432 (quoting Vitek v. Jones, 455 U.S. 480, 490-91 n.6 (1980)). Thus, Defendant cannot rely on the fact that it is now treating the Plaintiffs just like new applicants for a foster care license. Having created a property interest, Defendant has taken on the obligation of procedural fairness if he seeks to deprive the Plaintiffs of it.

advance notice of the effect the statutory amendment would have on them. The Court immediately noted that Atkins involved a legislatively mandated substantive change in the scope of an entire program, not individual eligibility determinations. Id. at 129. As such, the Court noted that the Due Process Clause imposes no substantive limit on Congress's authority to make substantive changes in the law of public benefits. Id. (citing Richardson v. Belcher, 404 U.S. 78 (1971)). The Court then held that legislative process provided all the process to which the plaintiffs were entitled. Atkins, 472 U.S. at 129-30 ("A welfare recipient is not deprived of due process when the legislature adjusts benefit levels . . . . The legislative determination provides all the process that is due.").

Defendant argues that this case is on all fours with Atkins, contending that HMR Reform is a mass change in the scope of foster care assistance in Illinois. From this, Defendant argues that the process provided by the Illinois General Assembly in debating and eventually passing HMR Reform provides all the process that is demanded by the Constitution. HMR Reform, however, is not merely a mass change in the scope of the foster care program. For many current recipients of full foster care benefits, HMR Reform is also a determination of their continuing ability to receive benefits. HMR Reform cuts off benefits to all those relative foster children and caregivers who had previously received benefits as a result of their approved status until DCFS renders a decision on their application for licensure. Therefore, unlike Atkins, where the benefit levels were reduced across the board, the benefit levels involved here may or may

not be changed by HMR Reform. HMR Reform, then, does not affect all participants in the pre-HMR Reform system, who are accordingly "property" holders, in the same manner. To the contrary, it discriminates against relative foster children and caregivers during this transition process.

HMR Reform does, in part, effectuate a mass change in the foster care program in Illinois. That portion of HMR Reform which represents a mass change, however, is not challenged by Plaintiffs in this litigation. Plaintiffs repeatedly disavow any attempt to challenge the State's ability to change the substance of the foster care program in the manner conceived in HMR Reform. The HMR Reform may clearly go forward with respect to individuals who have not yet entered the system or who maintain licensed foster homes. Furthermore, DCFS may immediately implement the portions of HMR Reform which change various substantive components of foster care, including the definition of neglect, the elimination of the "approved" category and many others, as long as those standards are applied equally to relative and non-relative caregivers.

The only part of HMR Reform that Plaintiffs do challenge is the elimination of benefits to relative foster children and relative caregivers who qualified under the previous system but do not have an opportunity to qualify under the new system because DCFS has not provided a mechanism by which it can make that determination before the change in benefit payments is scheduled to take place. Accordingly, this case falls into the caveat in Atkins involving individual eligibility determina-

tions, as HMR Reform essentially deprives relative foster care families of continuing full foster care payments.

Having determined that Atkins does not apply to the dispute raised in this litigation, the Court must still determine whether Plaintiffs received the process to which they are entitled. Plaintiffs contend that the instant case is analogous to Logan, in which the Supreme Court held that, although a state may reduce or terminate state created property interests generally, it cannot create procedural barriers to a property holder's ability to assert his rights. Logan, 455 U.S. at 433-34. In Logan, the plaintiff alleged unlawful employment discrimination before an administrative Commission, as he was required to do under the state scheme. Id. at 426. The Commission was obliged, by statute, to act on his charge within 120 days. Id. The Commission inadvertently failed to do so. Id. The case eventually reached the Illinois Supreme Court, which held that the Commission's failure to investigate plaintiff's charge within the required time period destroyed his cause of action, even though the Commission's failure to act was entirely out of plaintiff's control. Id. at 427. The Illinois Supreme Court held that no Due Process issue was presented because the Illinois legislature had provided all the process that was required when it passed the 120 day requirement. Id.

The Supreme Court of the United States unanimously reversed, holding that the Fourteenth Amendment requires an opportunity, granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. Id. at 437. Because the plaintiff's cause of action, his property,

was deprived in a random manner, without granting him an opportunity to present the merits, due process was lacking. Plaintiffs argue that HMR Reform does exactly that to their property, randomly destroying it without any regard to the merits of their claim for continued benefits.

As Logan establishes, procedures or systems that govern the administration of public aid programs must be fair and rational. States cannot create systems which arbitrarily deprive persons of property. In Carey v. Quern, 588 F.2d 230 (7th Cir. 1978), the Seventh Circuit wrote:

> In the context of eligibility for welfare assistance, due process requires at least that the assistance program be administered in such a way as to insure fairness and to avoid the risk of arbitrary decision making.

Id. at 232. In order to insure fairness, a party deprived of property by a change in the rules governing a government program must have a reasonable opportunity to present his case and have the merits fairly judged under the new rules. See Logan, 455 U.S. at 433. A state simply may not set up a system in which benefits are available to a class of persons, but it is impossible for any single person to demonstrate that they are entitled to continued benefits.

By providing that Plaintiffs' entitlement to full foster care benefits ends as of a particular date (either July 1, 1995 or September 30, 1995) unless DCFS acts on Plaintiffs' applications by that date (an event which the Court has found is very unlikely for most Plaintiffs), HMR Reform deprives Plaintiffs of their

property interests in continuing foster care benefits without the benefit of due process. The deadline date, on which Plaintiffs' property interest is destroyed is analogous to the 120 day deadline in Logan. Neither Plaintiffs here nor the plaintiff in Logan had any ability to expedite the process, their property interest was entirely in the hands of the State and the State is proceeding arbitrarily. Moreover, HMR Reform also established that no retroactive benefits will be paid, even where DCFS determines that the applicant was in continual compliance with the licensure requirements from the July 1 effective date. Thus no post-deprivation process is available either. In light of DCFS's practice of channelling related foster caregivers into the approved category rather than the licensed category, irrespective of their ability to qualify for a license, this system is arbitrary and unfair.

Just as the plaintiff in Logan was entitled to notice and a fair hearing before he was deprived of his property in the form of a cause of action, Plaintiffs here demand notice and a right to a fair consideration of their applications for continued benefits.[17] The Court agrees that the components of HMR Reform that deprive Plaintiffs of continued foster care payments without a fair adjudication of their claim of entitlement is unconstitutional.

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[17] It is important to recognize that Plaintiffs' applications for licensure are applications for a continuation of the benefits they have been receiving as long as they have been involved with DCFS.

## IV. RELIEF

Having held that the transition period established by HMR Reform violates both the Judgment Order and the Due Process Clause of the Fourteenth Amendment, the Court must determine what relief is appropriate. The Court has the authority to grant relief necessary to modify and enforce the Judgment Order as a result of its continuing jurisdiction over that Order and as a result of the violation of the Due Process Clause pursuant to 28 U.S.C. §§ 2201, 2202. The Court's goal in fashioning this relief is to provide, consistent with the Fourteenth Amendment, "an opportunity granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case." Logan, 455 U.S. at 437.

In the Court's opinion, the denial of due process can be remedied by allowing all relative foster caregivers, who received foster care benefits prior to HMR Reform, an opportunity to have their application for licensure determined on its merits before their benefits can be reduced. This relief would rectify the adverse disparity between relative and non-relative caregivers so that the relative caregivers, without being penalized for DCFS's prior practice of channelling non-relatives into a different category than relatives, would be granted or denied a license based on the same requirements as the non-relatives face. In addition, the opportunity for hearings on the merits of Plaintiffs' applications, assuming that the hearings are preceded by sufficient notice, will satisfy the requirements of the Due Process Clause.

As adequate notice lies at the heart of due process, Cosby v. Ward, 843 F.2d 967, 982 (7th Cir. 1988), the Court will require that another notice be sent to all unlicensed relative foster homes via first class mail. The notice should include an application for a foster care license[18] and an explanation of how to contact a DCFS field staff member or private agency case worker as well as the DCFS Ombuds' toll free hotline for assistance.

In order that relative foster caregivers have a reasonable time to prepare and file the application, the Court has determined that the deadline be 35 days from the date of mailing the notice and application. The Court requires that a caseworker be available to answer questions for caregivers who have questions. Furthermore, the Court requires that DCFS continue to provide the assistance of the Ombuds, mentioned in paragraph 80 of Defendant's Proposed Findings. If a relative caregiver fails to comply with the deadline for application, benefits may be reduced as envisioned in HMR Reform. If the applicant meets the deadline, benefits must continue at the full foster care rate until DCFS processes the application and renders a decision. If the application is denied, DCFS must clearly state the reasons for the denial. Of course, the licensure applications must be judged on the same basis as licensure applications received from

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[18] Each notice must include an application for a license, regardless of the current status of the relative foster home. This requirement represents a change from DCFS's practice to date, under which applications were sent only to those homes that were already approved.

non-relative caregivers in order to comply with the 1976 Judgment Order.

This relief places appropriate incentives on both the applicants and DCFS. The applicants are required to quickly comply with the portion of the licensing procedure that is within their control as they must submit an application for licensure within a reasonable specified time of delivery of the final notice. The applicants will not, however, be in jeopardy of losing their benefits based on DCFS's inability to process applications promptly. DCFS will be able to reduce the financial burden on itself by quickly determining which licensing applications are granted and which are denied. The Court believes that these incentives are far more sensible than those created by the HMR Reform transition, where applicants were helpless to speed their application along and DCFS could save very substantial amounts of money during the time the applications are pending.

In addition to properly coordinating the relative incentives, the relief structured by the Court is also fair. Relative foster caregivers will have a reasonable opportunity to present their claim for continued benefits so that they would be treated the same as non-relative foster caregivers.[19] On the other hand,

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[19] This opportunity is especially important because many relative foster care providers rely on full foster care payments to maintain their housing and the standard of living provided to the foster children. Plaintiffs provided the uncontested testimony of ten foster caregivers, each of whom described the impact a reduction in benefits would have upon the foster children and the foster care families. Each caregiver witness, as well as Plaintiffs' expert

(continued...)

the intrusion into the State's system of foster care is minimal. The Court does not interfere in any way with the State's ability to have the HMR Reform take effect on July 1, 1995, including changes in the definition of "neglect," the elimination of "non-removal" placements, increased licensure requirements such as six hours of training and a medical check, and many other changes. The Court emphasizes that none of the relief specified in this opinion applies to new participants in the DCFS system. Relief applies only to unlicensed caregivers who received full foster care benefits under the pre-HMR Reform system. The relief provided here is the minimum necessary to satisfy due process and the Judgment Order. DCFS, by granting unlicensed homes foster care benefits under the pre-HMR Reform system, voluntarily shouldered the burden of procedural fairness with respect to those caregivers and now must honor that responsibility. Because the restriction the Court places on the State's ability to implement HMR Reform is limited to the financial effect on unlicensed relative caregivers and will last only as long as it takes DCFS to process pending applications for licensure, the cost to the State will be substantially less than estimated. In any event, the extent of the expense is placed within the control of DCFS.

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[19](...continued)
witnesses, testified that a drop in payments would result in harm to the foster children affected. See, e.g., Gleesson Direct, pp. 9, 15, 20; Grimes Direct, p. 27; Campbell Direct, p. 5; Collins Direct, p. 5; Sumner Direct, p. 5.

The Court directs Plaintiffs to submit, as they have volunteered to do, a draft decree reflecting the decisions set forth herein by July 7, 1995. Defendant may also submit a draft decree and/or objections to the form of the decree by July 11. The Court sets a hearing and ruling date of July 12, 1995 at 4:00 p.m.

In this case, there are at least one state court decree and two federal court decrees that impact on the HMR Reform implementation. Through this proceeding, the Court has been made aware of the administrative problems that are created by long-standing, unending court decrees. When the transition period to HMR Reform has been completed, the Court would entertain further proceedings on what portion, if any, of the 1976 decree should remain in effect and for what period of time.

## CONCLUSION

For the reasons given in this opinion, Plaintiff's Motion to Adjudicate Director McDonald in Civil Contempt is DENIED. Plaintiffs' Motion for Supplemental Relief is GRANTED. All other motions made in the course of this litigation are DENIED.

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

DATED: June 30, 1995

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| MARCEL YOUAKIM, et al., | ] | |
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| *Plaintiffs,* | ] | |
| | ] | |
| v. | ] | No. 73 C 635 |
| | ] | |
| | ] | Judge John A. Nordberg |
| JESS MCDONALD, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, | ] | |
| | ] | |
| *Defendant.* | ] | |

**ORDER**

The Court hereby enjoins Director McDonald and DCFS from terminating, suspending, or reducing foster care payments to relative foster children currently receiving them until defendants have complied with the instructions of the Court detailed in a Memorandum Opinion and Order issued today.

The Court hereby enjoins Director McDonald and the Illinois Department of Children and Family Services from terminating, suspending, or (under the HMR Reform Plan) reducing foster care payments to all relative foster children currently receiving foster care payments until defendants give those children and

their relative foster parents an opportunity to have any application for licensure determined on its merits. All relatives who have not yet submitted an application shall have a reasonable time to prepare and file the application, the Court has determined that the deadline be 35 days from the date of mailing the notice and application. The Court requires that a caseworker be available to answer questions for caregivers who have questions. Furthermore, the Court requires that DCFS continue to provide the assistance of the Ombuds, mentioned in paragraph 80 of Defendants' Proposed Findings. If a relative caregiver fails to comply with the deadline for application, benefits may be reduced as envisioned in HMR Reform. If the applicant meets the deadline, benefits must continue to the full foster care rate until DCFS processes the application and renders a decision. If the application is denied, DCFS must clearly state the reasons for the denial. Of course, the licensure applications must be judged on the same basis as licensure applications received from non-relative caregivers in order to comply with the 1976 Judgment Order.

The Court directs Plaintiffs to submit, as they have volunteered to do, a draft decree reflecting the decisions set forth herein by July 7, 1995. Defendant may also submit a draft decree and/or objections to the form of the decree by July 11. The Court sets a hearing and ruling date of July 12, 1995 at 4:00 p.m.

6/30/95

/s/ John A. Nordberg
Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| MARCEL YOUAKIM and LINDA YOUAKIM, et al., | ] | |
| *Plaintiffs,* | ] | |
| v. | ] | No. 73 C 635 |
| JEROME MILLER, et al., | ] | |
| *Defendant.* | ] | |

**JUDGMENT AND ORDER**

This matter coming on to be heard pursuant to the Memorandum Decision and Judgment of the Three Judge District Court, 374 F. Supp. 1204 (N.D. Ill. 1974), the judgment of the United States Supreme Court vacating the prior three-judge court judgment and remanding, ___ U.S. ___, 96 S. Ct. 1399 (1976), and this Court's Memorandum Opinion and order dated July 27, 1976, and the Court having determined that the several provisions of this Decree are necessary to afford the plaintiffs and members of the plaintiff class the full equitable relief to which they are entitled:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. Ill. Rev. Stat. ch. 23 § § 2212.05, 2212.17 and implementing policies and procedures of the Illinois Department of Children and Family Services ("DCFS") are contrary to 42 U.S.C. § § 601 and 608, implementing federal regulations, and Department of Health, Education and Welfare Program Instruction API-P1-75-9 and are therefore invalid under the Supremacy Clause of the United States Constitution, Article VI. cl. 2 insofar as they exclude from eligibility, or deny full Aid to Families with Dependant Children-Foster Care payments (hereinafter, "full AFDC-F payments") under 42 U.S.C. § 608, or ancillary public assistance benefits and services under Titles IV, XIX, and XX of the Social Security Act and the Food Stamp Act of 1964 (hereinafter "ancillary benefits"), to:

(a) dependant foster children otherwise eligible for these full AFDC-F payments and ancillary benefits, because such children live in foster family homes or child care institutions (hereinafter, "foster homes") maintained by foster parents or other persons (hereinafter, "foster parents") who are related to them;

(b) foster parents otherwise eligible for these full AFDC-F payments and ancillary benefits, because such parents maintain foster homes for foster children related to them.

2. 42 U.S.C. §§601 and 608 require that whenever a child has been or is removed from the home of a relative specified in 42 U.S.C. §606(a) as the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and his placement and care are the responsibility of defendants, and such child is placed by defendants in a licensed or approved foster home maintained by relatives of the child, such child and those relatives shall be eligible for full AFDC-F payments and ancillary benefits to the same extent as a child placed in a foster home maintained by foster parents not related to the child, and such parents.

3. The plaintiff class in this case, pursuant to F.R.C.P. 23(a) and (b)(2) consists of:

(a) all persons eligible for AFDC-F payments and ancillary benefits, but who have been or are being denied such payments or benefits, in whole or in part, by defendants because they maintain foster homes for wards of the state (foster children) related to them.

(b) all wards of the state (foster children) eligible for AFDC-F payments and ancillary benefits, who have been or are being denied such payments or benefits, in whole or in part, by defendants because they are living in foster homes maintained by foster parents related to them.

(c) all wards of the state (foster children) not living with their relatives because such relatives have

been unable to accept them as foster children without the full AFDC-F payments and ancillary benefits provided to foster families in which foster parents are unrelated to the foster children, and such relatives.

4. Defendants, their agents, employees and all other persons in active concert with them are enjoined from:

(a) enforcing Ill. Rev. Stat. ch. 23, §§2212.05, 2212.17, and 5005, and all implementing administrative policies and procedures, insofar as they exclude from eligibility, or deny full AFDC-F payments or ancillary benefits to, foster children living in foster homes maintained by related foster parents, and to these related foster parents, when such children and such parents are otherwise eligible for such payments and benefits;

(b) failing to pay full AFDC-F payments to foster children living in foster homes maintained by related foster parents, and to these related foster parents, when such children and parents are otherwise eligible for such payments;

(c) failing to provide, or assist in providing, ancillary benefits to foster children living in foster homes maintained by related foster parents, and to these related foster parents, when such children and parents are otherwise eligible for such payments (to the same extent as defendants provide, or

assist in providing, benefits to foster children living in foster homes maintained by unrelated foster parents, and to these unrelated foster parents).

5. Defendants shall make the first cash payment of full AFDC-F payments on or before October 1, 1976, to foster parents who currently have related foster children living with them. Such first payment shall be for the period July 27, 1976, to October 1, 1976, and for each such foster parent so paid such first payment, shall not be less (when added to other Aid to Families with Dependant Children payment for this period) than the amount of AFDC-F payments which would have been paid to each such parent had each been maintaining a foster home for unrelated foster children for this period.

6. On or before October 1, 1976, defendants shall, by the notice attached hereto as Exhibit A, inform all foster parents with whom related foster children are currently living, of the provisions of this Order, of their eligibility for full AFDC-F payments and ancillary benefits, and of the reason for the issuance of the first benefit payment described in paragraph 5.

7. Within forty (40) days from the date of the entry of this Order, defendants shall submit to the Court, for approval, policies and procedures issued pursuant to and to implement this Order, amending existing provisions insofar as existing policies and procedures presently exclude from eligibility or deny full AFDC-F foster care payments and ancillary benefits to otherwise eligible foster children and foster parents related

to them, because such foster children are living in foster homes maintained by such foster parents, and/or which are otherwise inconsistent with or frustrate the statutory policy of Title IV of the Social Security Act, 42 U.S.C. §601 et seq., favoring placement of such foster children in the homes of relatives. The policies and procedures which shall be modified and amended include, but are not limited to:

(a) DCFS regulations, including Regulation No. 5.12 (Minimum Standards for Licenced Foster Family Homes);

(b) DCFS Policies and Procedures Manual provisions, including Policy and Procedure §§2.14 (Principles and Policies for Child Placement), 2.16 (Essential Elements in Foster Care), 2.1.12 (Selection of Foster Care Resource), 2.21 (Utilization of Foster Family Homes - Definition);

(c) Placement Agreement Forms utilized in foster care placement;

(d) Purchase of Service Agreements, data record policies, memoranda, staff instructions, forms, computer programs, and other policies and procedures, if change therein is necessary to fully comply with and effectuate any provision of this Order.

Not less than ten (10) days prior to the date defendants submit to the Court for approval such policies and procedures, defendants shall serve upon the attorneys for plaintiffs a copy

of said policies and procedures. After the Court approves such policies and procedures, including the amendments to existing provisions, defendants shall cause such policies and procedures to be promptly promulgated and effectuated.

8. Defendants shall take all necessary action, including but not limited to that described in subparagraphs (a), (b), and (c) hereof, to identify relatives capable of providing foster homes for defendants' wards currently residing in child care institutions or foster family homes maintained by unrelated persons. In any case where such a relative is willing to provide a foster home for the related child, placement and/or transfer decisions for the related foster child shall continue to be made under defendants' policies and procedures, as amended pursuant to this Order, and in the best interests of the child, but with due regard to the statutory policy, 42 U.S.C. §601 et seq., favoring placement of such a child in the home of a relative.

(a) For foster children not currently residing with relatives, defendants shall identify relatives from defendants' case files (and in the absence of sufficient information in the case files, by questioning the foster children and the relatives from whose home the child was removed). Defendants shall send to all such identified relatives the notice attached hereto as Exhibit B, by November 15, 1976.

(b) Whenever defendants shall receive a response from such relatives indicating that they are or may be willing to provide foster homes for foster

children related to them, defendants shall take all action necessary to approve or disapprove the relatives' home and arrange placement or transfer, when appropriate, within two months after receiving such a response.

(c) Relatives who request that, and/or apply to have their home licensed or approved as a foster home, or who request and/or apply for the placement or transfer of a related foster child in or to their home, shall have the rights of hearing and appeal provided pursuant to DCFS Regulation Nos. 2.18 and 5.02 in any case in which such requests or applications are denied or not acted upon promptly. In any case in which such an application or request is denied, the relative shall be entitled, when the denial is made, to notice of the reasons for such denial, and the reasons for such denial shall also be entered in the foster child's case record.

9. Defendants shall henceforth consider all placements and transfers of foster children and make all regular periodic evaluations of existing placements of foster children under defendants' policy and procedures, as amended pursuant to this Order, and in the best interests of the child, but with due regard to the statutory policy, 42 U.S.C. §601 et seq., favoring placement of such a child in the home of relatives.

10. Within ten (10) days from the entry of this Order, defendants shall cause to be directed to each DCFS administrator,

caseworker, and other employee having responsibilities related to the AFDC-F program, a copy of this Order together with a notice stating that all DCFS policies and procedures inconsistent therewith are null, void, and of no further effect.

11. Defendants shall furnish to the Court and to plaintiffs' attorneys a report on or before November 1, 1976, attesting to the accomplishment of the provisions of paragraphs 4-7, 9 and 10 of this Order, and shall file on or before February 1, 1977, a report attesting to the accomplishment of the provisions of paragraph 8 of this Order.

12. This Court shall retain continuing jurisdiction over this action.

ENTER:

/s/ Alfred Y. Kirkland
ALFRED Y. KIRKLAND
Judge, United States District Court

Dated: August 24, 1976

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

No. 95-1670

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

JESS MCDONALD,

*Petitioner,*

vs.

MARCEL YOUAKIM, *et al.*,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## BRIEF OF ALABAMA, CALIFORNIA, COLORADO, THE DISTRICT OF COLUMBIA, IDAHO, KANSAS, MARYLAND, MONTANA, NEVADA, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, AND PENNSYLVANIA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 95-1670

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

JESS MCDONALD, *Petitioner,*

*v.*

MARCEL YOUAKIM, *et al.*, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## BRIEF OF ALABAMA, CALIFORNIA, COLORADO, THE DISTRICT OF COLUMBIA, IDAHO, KANSAS, MARYLAND, MONTANA, NEVADA, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, AND PENNSYLVANIA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## INTEREST OF AMICI CURIAE

The above-listed States and the District of Columbia respectfully submit this brief as amici curiae in support of the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.[1] Amici are states[2] that each administer numerous entitlement

[1] A Petition for Writ of Certiorari was filed on April 16, 1996,by defendant Jess McDonald, the Director of the Illinois Department of Children and Family (continued...)

programs subject to the Due Process Clause of the United States Constitution. Amici submit this brief to alert the Court to the wide-ranging and potentially catastrophic consequences that would follow if the Seventh Circuit's decision, a decision that drastically undermines important decisions[3] of this Court recognizing and protecting state sovereignty, is allowed to stand. While the case at bar involves payments to a few thousand recipients by one agency in one state, the holding itself can logically be applied to every conceivable entitlement program run by countless state and local agencies throughout the country.

The Seventh Circuit's interpretation of the Due Process Clause, requiring a state to conduct individualized eligibility determinations for all existing recipients before that state may make any changes in its own entitlement programs, provides a new and significant barrier to the current trend of welfare reform. The uncertainty in due process jurisprudence created by the ruling, as well as the administrative

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[1](...continued)

Services ("DCFS" or "the Department") (cited herein as "Petition" or "Pet."). Pursuant to Rule 37.5, the consent of the parties to file this brief is not required, given that the brief is presented on behalf of 12 states and the District of Columbia, and is submitted by the Attorneys General of those states and the Corporation Counsel of the District of Columbia.

[2] Congress has recognized that the District of Columbia shares the interests of the states in providing benefits under the Social Security Act. See 42 U.S.C. § 1301(a)(1).

[3] As set forth in Defendant Jess McDonald's petition for certiorari, those decisions include, *inter alia*, Atkins v. Parker, 472 U.S. 115 (1985), Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441 (1915). Pursuant to Rule 37.1, the amici here will not restate the legal arguments presented in the Petition, but instead provide this Court only with additional relevant information that has not already been presented.

burdens it places on the states, will chill state efforts to reform welfare services. States that proceed with reform efforts will be shackled by the excessive administrative process now required for thousands of former recipients, and will be required to defend against the inevitable federal lawsuits challenging the particular characterization of any reform scheme and the contours of the process due. In addition, the public interest will be thwarted as states, often conceived of as responsive to the needs of the local citizenry, become less responsive due to the resulting administrative and fiscal burdens. Finally, the Seventh Circuit's decision corrupts the time-honored principles of federalism and comity by diminishing the sovereign power of the states. Because the above-listed States share an interest in proceeding with necessary reforms, protecting the public interest, and maintaining undiminished their own sovereign power, they respectfully urge this Court to grant the writ of certiorari, and to reverse the decision below.

## I.
## THE SEVENTH CIRCUIT'S DECISION, IF ALLOWED TO STAND UNTESTED, WILL CHILL SOCIAL WELFARE REFORM AT THE VERY MOMENT THAT CONGRESS HAS SHIFTED RESPONSIBILITY FOR SUCH REFORM TO STATE GOVERNMENTS

The current shift in responsibility for social welfare entitlement programs from the federal government to the states is unparalleled in scope and concentration. Robert Pear, Altered States; Shifting Where the Buck Stops, N.Y. Times, Oct. 29, 1995, § 4 at 1. Because of this shift, state executive officials and legislatures are now re-examining entitlement programs in their entirety, at times designing substantial reforms, and at times creating new programs to respond to changes in federal legislation. Id. Even without the shift from federal control to state responsibility, state governments throughout the country have begun to re-evaluate social welfare entitlement programs in response to a number of converging social and economic factors. Sam Howe Verhovek, Welfare in Transition; The National

Picture; States are Already Providing Glimpse at Welfare's Future, N.Y. Times, Sept. 21, 1995, at A1. In other words, federal policy, as well as the general social and economic climate, have created a situation in which states are currently re-evaluating social welfare entitlement programs in unprecedented numbers, and are doing so with an eye to drastic and far-reaching reforms aimed at providing new incentives for social welfare beneficiaries.

In the midst of all of this activity, the United States Court of Appeals for the Seventh Circuit handed down the decision below, a decision that has the potential of impeding the very arena--state government--thought by Congress to be the cure for federal gridlock with regard to reforms of similar programs. See, e.g., 142 Cong. Rec. S180 (daily ed. Jan. 22, 1996) (statement of Sen. Specter). Because the decision below represents a significant departure from this Court's due process jurisprudence, the very existence of the decision creates significant uncertainty as to the permissible scope of social welfare reform. Thus, legislatures and executive officials will be reluctant to undertake meaningful and effective reform in this arena without further guidance from this Court. In addition, the decision, if allowed to stand, has the potential of substantially burdening any future reform efforts to such an extent that state lawmakers may, in the end, retreat from current activities out of a reluctance to enter into complicated and costly administrative procedures, procedures which may themselves require further federal court intervention to discern.

### A. Departure From Traditional Due Process Jurisprudence Will Chill Reform Efforts As States Can No Longer Be Certain As To Constitutional Limitations on Social Welfare Reform

As set forth in the petition for certiorari, Pet., § I, the Seventh Circuit's decision is in stark contrast to this Court's due process jurisprudence, which had previously been interpreted to permit states "to make substantive changes in the law of entitlement to public

benefits" without first providing individualized hearings for each and every citizen potentially affected by the change in law. See Richardson v. Belcher, 404 U.S. 78, 81 (1971). Accord Atkins v. Parker, 472 U.S. 115 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441 (1915). Without review of the Seventh Circuit's decision by this Court, state legislators and executive officials currently involved in the reforms described above will have no way of knowing for certain whether proposed reform programs comply with the Due Process Clause of the United States Constitution. Clearly, this state of affairs is unacceptable, and as a policy matter has the potential of drastically slowing any progress on social welfare reform currently being developed at the state level.

**B. The Administrative Burdens Placed On States By The Seventh Circuit's Decision Will Unnecessarily Chill The Current Climate Of Reform**

The Seventh Circuit's decision forces state policy makers contemplating social welfare reform to consider two factors that they need not have considered prior to the decision below. First, they must consider the cost (in time and money) of providing individualized hearings to every citizen potentially affected by a substantive change in state welfare policy. Second, they must consider the cost (again in time and money) of litigation that most certainly will arise as potential beneficiaries challenge, in federal court, the specific contours of the processes provided. Indeed, proceedings in the case below continue on this very issue. While certainly in every case these factors will not bring needed reforms to a halt, reform will be slowed, and in some cases innovative programs will certainly be bypassed. See, e.g., Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 285 (1984) ("Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policy-making constrained by constitutional requirements on whose voices must be heard."). Such consequences are so costly

that they should not be imposed on the states unless and until it is clear that they are required by the Due Process Clause.[4] Review by this Court would provide a definitive answer, one that state policy makers could rely on in designing and implementing reforms to social welfare programs.

## II.
## THE DECISION BELOW, IF LEFT UNTESTED, UNNECESSARILY THWARTS PUBLIC POLICY BY LIMITING THE RESPONSIVENESS OF STATE GOVERNMENTS

Much of the justification for the current shift in responsibility for social welfare programs from the federal government to the states centers around the states' ability to respond quickly and effectively to local conditions and concerns. See Pear, supra. In addition, state governments are likely to better represent the myriad interests of the local community than the relatively few members of Congress that represent each state at the federal level. It is especially true then at the level of state government, that the legislative process truly provides "all the process that is due." Atkins v. Parker, 472 U.S. 115, 129-30 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33 (1982). Clearly, the decision below restricts the responsiveness of state governments to the needs of its citizens. Every reform effort will be stymied and delayed because of the necessity of conducting elaborate eligibility determinations for any citizen affected by a change in state law and policy. Again, the costs to the states and their citizens is great; public policy should not be thwarted in this manner unless and until it is definitively determined by this Court that the Constitution restricts social welfare reform in such a manner.

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[4] In fact, the amici here believe that these negative consequences are not required by the Due Process Clause. See Pet., § I.

## III.
## THE DECISION BELOW, IF LEFT UNTESTED, CORRUPTS THE TIME-HONORED PRINCIPLES OF COMITY AND FEDERALISM BY IMPERMISSIBLY EXTENDING THE REACH OF FEDERAL LAW

Clearly, the state, as a sovereign power, has the right either to provide social welfare programs or not to provide such programs, and accordingly, it is free to "eliminate [social welfare] payments that were never required by" federal law. See Pet. at 9, citing App. 28a. Prior to the reforms at issue here, the Illinois State legislature, like other state legislatures, determined that it would be appropriate to supplement the federal foster care payment program with a separate state-funded and administered foster care payment program. As the reforms at issue here indicate, the State of Illinois recently determined that such a use of its resources was no longer appropriate, and accordingly, it made a decision to supplement the federal foster care payment program to a much lesser extent than it had previously. The Seventh Circuit, however, found that Illinois could not alter its own independent foster care payment program, unless it first provided eligibility determinations for a federal program that operated in the same arena. See Pet., 4-10. The Seventh Circuit's ruling has transformed the State's decision to supplement a federal program into an irrevocable commitment to serve a select group of citizens. Rather than a requirement to provide due process, which, as this Court has previously held, is provided in such cases by the legislative process itself, Pet., § I, the Seventh Circuit's decision must be viewed as extending federal law in a manner not contemplated by federal statute, and not permissible under a Constitution that embodies the principles of federalism and comity.

## CONCLUSION

WHEREFORE, for the reasons stated herein and in the Petition, amici respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Dated: May 24, 1996

Respectfully submitted,

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## EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

(3)

No. 95-1670

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

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JESS MCDONALD,

*Petitioner,*

v.

MARCEL YOUAKIM, *et al.*,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

## MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

---

Respondents ask leave to file the attached Brief In Opposition To The Petition For Certiorari, without prepayment of costs and to proceed *in forma pauperis*. In support of this motion, they state:

1. Respondents include approximately 26,000 Illinois foster children who, when this case was reopened in March, 1995, were all receiving publicly funded foster care benefits from the Illinois Department of Children and Family Services. Respondents also include these children's relative foster parents (foster parents who are related to the children by blood or marriage). Respondents are part of a certified class of Illinois foster children and foster parents. See Appendix To Petition For Writ Of Certiorari ("App.") at 92a-93a. Most if not all of the respondent foster children are indigent. See 42 U.S.C. §672(a)(4) (to be eligible for federal

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foster care benefits, a child must have been living in a home eligible for Aid to Families with Dependent Children benefits). Most of the respondent foster parents are also poor. See App. at 84a n. 19.

2. Respondents sought leave to proceed in petitioner's appeal of the district court's judgment herein to the United States Court of Appeals For The Seventh Circuit *in forma pauperis*. On August 9, 1995, the district court granted this motion.

3. In support of this motion, respondents attach the declarations of Theola Crawford and Willie May Carter, who as relative foster parents in Illinois and members of the certified plaintiff class, are parties to this proceeding.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JESS MCDONALD,

Petitioner,

v.

MARCEL YOUAKIM, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**DECLARATION IN SUPPORT OF MOTION TO PROCEED *IN FORMA PAUPERIS***

I. I, Theola Crawford, declare that, as an Illinois relative foster parent and a member of the certified plaintiff class in this case, I am a respondent in the above entitled case; and that in support of my motion to proceed herein without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to present a response to the Petition for Writ of Certiorari.

I further declare that the responses which I have made to the questions and instructions below are true.

1. Are you presently employed? No.

a. If the answer is yes, state the amount of your salary or wages per month and

give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received: I last worked in 1980 as a cashier for a currency exchange at the Greyhound bus station in Chicago, Illinois. For this work I was paid about $1,200 per month before taxes.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment,or in the form of rent payments, interest, dividends, or other source? No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months:

3. Do you own any cash or checking or savings account? No.

a. If the answer is yes, state the total value of the items owned:

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

a. If the answer is yes, describe the property and state its approximate value:

5. List the persons who are dependent upon you for support and state your relationship to those persons: I am caring for five relative children, their names and ages are:

Kimberly Crawford (grand child) (19), Olex Outlaw (nephew) (9), Terrel Outlaw (nephew) (7), Diontay Outlaw (nephew) (4), and Dwan Outlaw (nephew) (3).

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 20, 1996.

Theola Crawford

No. 95-1670

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JESS MCDONALD,

Petitioner,

v.

MARCEL YOUAKIM, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## DECLARATION IN SUPPORT OF MOTION TO PROCEED *IN FORMA PAUPERIS*

I. I, Willie May Carter, declare that, as an Illinois relative foster parent and a member of the certified plaintiff class in this case, I am a respondent in the above entitled case; and that in support of my motion to proceed herein without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to present a response to the Petition for Writ of Certiorari.

I further declare that the responses which I have made to the questions and instructions below are true.

1. Are you presently employed? No.

a. If the answer is yes, state the amount of your salary or wages per month and

give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received: I last worked in 1986 as a launderer at the Holiday Laundry, located at 8138 N. Florence in Skokie, Illinois. For this work I was paid $3.75 per hour, plus piece work. My gross monthly income was about $600 before taxes.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment,or in the form of rent payments, interest, dividends, or other source? No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months:

3. Do you own any cash or checking or savings account? No.

a. If the answer is yes, state the total value of the items owned:

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

a. If the answer is yes, describe the property and state its approximate value:

5. List the persons who are dependent upon you for support and state your relationship to those persons: I am caring for eight grand children, their names and ages are:

Erica Carter (13), Temeka Carter (12), Tiffany Carter (10), Derrick Carter (8), Norma Jean Jones (7), Teresa Jones (6), Takiah Jones (4) and Eric Jones (3).

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 20, 1996.

Willie May Carter

No. 95-1670

IN THE

**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1995

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JESS MCDONALD,

*Petitioner,*

v.

MARCEL YOUAKIM, *et al.*,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**BRIEF IN OPPOSITION**

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May 24, 1996

## QUESTION PRESENTED

Until July 1, 1995, approximately 26,000 abused and neglected children whom Illinois placed with caretakers related to the children received cash foster care benefits under the state's foster care program, even though their relative foster homes were "unlicensed". On June 6, 1995, the Governor signed into law a new state statute that established the eligibility requirement that all foster homes must be "licensed". To effect the transition from benefit eligibility for children in "unlicensed" homes to eligibility only for children in "licensed" homes, the new statute also directed state officials to terminate the foster care benefits of all relative foster children living in homes that had not become licensed as of short deadline dates. The deadlines were July 1 and September 30, 1995, depending on the category of unlicensed foster home in which the child lived. The district court found, as a matter of fact, that the state's transition procedures made it impossible for Illinois to decide by the benefit termination deadlines these children's claims that their homes in fact met the licensure standards and should be licensed. The question for decision is:

Whether a state, consistent with the Due Process Clause of the Fourteenth Amendment, may terminate the cash benefits it pays to children under an ongoing social welfare program on the ground that the children had not met a new substantive eligibility requirement by a set transition deadline, when the state has neither considered nor decided on their merits the claims of the children that they in fact meet the new requirement.

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No. 95-1670

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**IN THE SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1995

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JESS MCDONALD,

Petitioner,

v.

MARCEL YOUAKIM, et al.,

Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**BRIEF IN OPPOSITION**

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Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari ("Pet.") seeking review of the Seventh Circuit's opinion in the case (App. 1a-44a).

**CONSTITUTUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Due Process Clause of the Fourteenth Amendment to the United States Constitution is set out in the petition. Pet. at 3-4. This case also involves the following statutes:

Title IV-E of the Social Security Act, 42 U.S.C. §§671 et seq. (1994),

42 U.S.C. §672 (Supp. App. 1a-3a)[1];

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1 Respondents cite to their Supplemental Appendix ("Supp. App."), which is bound with this Brief

20 ILCS 505/5(u-5), as amended by P.A. 89-21, Art. 5, §5-15 (Supp. App. 4a);

20 ILCS 505/7(b), as amended by P.A. 89-21, Art. 5, §5-15 (Supp. App. 5a-6a).

## STATEMENT OF THE CASE

### A. The Illinois Foster Care Program

**1.** The children in the plaintiff class are over 26,000 of the 47,007 abused and neglected children in Illinois whose care is the legal responsibility of the Illinois Department of Children and Family Services ("DCFS"). App. 54a, 92a-93a (defining class). DCFS assumes responsibility for the care of abused and neglected children pursuant to orders of Illinois juvenile courts appointing the agency the children's custodian. App. 52a.

**2.** DCFS places the children committed to its care in various placements, including group homes, institutions, and foster family homes. App. 52a. The plaintiff children are all in DCFS custody, and DCFS has placed them in family homes with foster parents who are related to the children. App. 48a, 52a. The plaintiff children are thus "relative foster children" living with "relative foster parents."

**3.** At all relevant times, DCFS has placed foster children in non-relative homes only if those homes have first secured a foster home license. App. 52a. In contrast, DCFS has placed foster children in relative homes following only a safety check of the home, which grants the home "pre-approval". App. 6a, 52a.

**4.** Until July 1, 1995, a foster child's assigned caseworker, after placing a foster child with a relative foster parent and "preapproving" the relative home, could initiate a formal "approval" process for the home, pursuant to the special relative home approval rule that DCFS adopted in 1986. App. 52a-54a. The approval process was very similar to the licensure process: both processes required a formal application and that household members submit to

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In Opposition. The Supplemental Appendix sets forth the statutes involved in this case. It also includes other material that respondents believe essential to understand the Brief In Opposition. See S. Ct. Rule 14.1(i)(vi).

fingerprinting, to a criminal background check, and to an inspection of the home before DCFS would determine whether the home met the applicable state standards. App. 54a, 58a, 61a. Moreover, the substantive approval standards were "substantially the same with regard to the safety, health and welfare of children" as the substantive licensing standards. App. 54a n.9.

5. Both the licensing and approval processes were beset with "administrative difficulties" attributable to DCFS. App. 58a. As a result, long time delays attended the processing of license and approval applications. App. 64a-65a. DCFS policy was that a "decision to issue a license should be made within seventy-five days of the time the application is filed... ." App. 64a. "However, DCFS statistics indicate[d] that only 19.3% of all licensing applications in Cook County in fiscal 1994 were licensed within seventy-five days." App. 64a-65a. On average, it took approximately six months from the time an application was filed for DCFS to complete the formal licensure process. App. 64a (citing testimony of children's expert witness).

6. Prior to July 1, 1995, DCFS paid full foster care benefits of approximately $350 per month per child to a relative foster parent on the foster child's behalf regardless of whether the relative foster home was "preapproved" or "approved" or "licensed". App. 52a-53a. Therefore, relative foster parents had no financial incentive to become approved or licensed, and the distinction between being "preapproved", as opposed to "approved or licensed", "understandably escaped" them. App. 53a; App. 52a-53a.

7. The distinction between a relative home that had been "preapproved" and one that had been "approved or licensed" had substantial significance for Illinois' financing of its foster care program, though not for individual foster children. Id.; App. 9a. Specifically, under Title IV-E of the Social Security Act, 42 U.S.C. §§671 et seq. ("Title IV-E"), Illinois was eligible to receive federal reimbursement for the foster care benefits it paid only if, inter alia, the child lived in a "licensed" family home or a home "approved...as meeting ...[licensing] standards." 42 U.S.C. §672(a)(3) & (c). See 42 U.S.C. §674 (federal reimbursement statute).

8. The approval process was somewhat "less intrusive and had fewer requirements than licensing." App. 63a. Therefore, "to the extent DCFS encouraged relative caregivers to

apply to be approved or licensed, DCFS usually encouraged the approval process." App. 57a. Indeed, DCFS "channeled relative caregivers towards the approval category rather than licensure." App. 69a. Thus, "the licensing process was not equally available to both relative and non-relative foster homes." App. 63a (emphasis added).

**9.** Because DCFS channeled relative children away from licensure, as of April 30, 1995, "only 1.2% of all related children in foster care resided in licensed homes, while 42.6% of such children lived in approved homes... ." App. 64a. As of the same date, "22.2% of the pre-approved homes had applications for approval pending." Id.

### B. The Home Of Relative Reform Plan ("HMR Reform") And The HMR Transition Process

**10.** On May 26, 1995, the Illinois legislature enacted, and on June 6, 1995, the Governor signed into law P.A. 89-21, amending 20 ILCS 505/5(u-5) and 7(b), Supp. App. 4a-6a. App. 9a-10a, 47a. The new statute , as implemented by DCFS under the so-called Home of Relative Reform Plan ("HMR Reform"), made significant substantive changes in Illinois' foster care program, effective July 1, 1995. These changes included: (a) the imposition of more stringent substantive licensing standards for foster family homes (Supp. App. 5a-6a; App. 59a); (b) the elimination of formal "approval" as a basis for foster family home certification (Supp. App. 4a; App. 58a); (c) a new requirement that, for a foster child to receive full foster care benefits, he or she must live in a "licensed" foster care home (Supp. App. 4a; App. 9a, 59a-60a); and (d) a measure allowing DCFS to maintain children in its custody in unlicensed relative homes (Supp App. 5a-6a; App. 59a), where they would be eligible only for "standard of need" payments under the Aid to Families with Dependent Children ("AFDC") program (42 U.S.C. §§601 et seq.), which, depending on family size, are 42% to 72% lower per child than full foster care benefits, App. 60a.

**11.** The substantive changes to the Illinois foster care program under HMR Reform did not eliminate the Illinois foster care program or change the terms of federal reimbursement for foster care payments. App. 10a, 38a, 77a-78a. Before and after the effective date of HMR

Reform, DCFS paid full foster care benefits of $350 per month to all of the children in its custody that it found eligible for them. App. 5a-12a, 52a, 60a.

(a) Before and after the effective date of HMR Reform, Illinois received federal reimbursement under Title IV-E for the benefits it paid to the children who met the Title IV-E eligibility requirements. App. 9a, 53a. See 42 U.S.C. §674. These requirements included: that the child's removal from the child's own home have occurred pursuant to a voluntary placement agreement or a judicial determination ("removal criterion") (42 U.S.C. §672(a)(1)); that the child is in DCFS custody (42 U.S.C. §672(a)(2)); that the child live in a licensed or approved home (42 U.S.C. §672(a)(3) and (c)); and that the child either received AFDC assistance or would have been eligible for AFDC ("AFDC-relatedness criterion"), 42 U.S.C. §672(a)(4). See 42 U.S.C. §672(a)(3), (c) (permitting states to choose "licensure" or "approval" or both as a basis of a child's eligibility for federally-assisted Title IV-E benefits; under HMR Reform, Illinois chose "licensure" as the only basis of eligibility for such benefits).

(b) Before HMR Reform, as long as a child was in DCFS custody and placed in a foster home (whether preapproved, approved or licensed), the child was eligible for state-funded full foster care benefits. App. 52a. HMR Reform added the requirement that a child's foster home must be licensed. P.A. 89-21, amending 20 ILCS 505/5(u-5), Supp App. 4a-5a. Illinois did not, either before or after the effective date of HMR Reform, impose a "removal criterion" or an "AFDC-relatedness criterion" as eligibility requirements for receipt of state-funded foster care benefits. First Stipulation of Uncontested Facts, No. 14 (Supp. App. 8a); 20 ILCS 505/5(u-5), as amended by P.A. 89-21, Supp. App. 4a. Thus, even after HMR Reform, Illinois continued to pay full foster care benefits of approximately $350 per month to children who lived in a "licensed home" but did not meet one or more of the other federal eligibility requirements, such as the "removal criterion". Trial Testimony of DCFS Official Mary Sue Morsch at 176-77, Supp. App. 11a-12a. See App. 10a, 12a, 59a.

12. Under HMR Reform, an unlicensed relative foster home's application for a license is treated as an application for foster care benefits federally-reimbursable under Title IV-E. This

is because, after the effective date of HMR Reform, Illinois receives federal financial reimbursement for foster care benefits only if they are paid to children in licensed homes. See ¶11(a), supra.

**13.** From its inception in P.A. 89-21, the HMR Reform Plan incorporated varying transition deadlines by which children's homes had to become "licensed" under the amended licensure standards in order for the children to continue to receive full benefits. App. 59a-60a, 62a. Specifically, the HMR Reform Plan allowed homes that were already licensed (almost exclusively non-relative homes, see ¶¶3, 9, supra) to demonstrate that they met the new standards at whatever time--up to two years after the July 1, 1995, effective date of HMR Reform--their licenses next came up for review. App. 12a & n.8, 59a-60a. On the other hand, the HMR Reform Plan required homes that had been approved or preapproved (exclusively relative homes, see ¶¶3, 4, supra) to secure a license under the amended standards by set deadlines. App. 59a-60a, 62a. DCFS would terminate the foster care benefits of all the relative children in homes that did not secure a license by the applicable deadlines. Id. For plaintiff children living in preapproved foster homes, the applicable deadline (benefit cut-off) date was July 1, 1995. Id. For plaintiff foster children living in approved homes, the deadline was September 30, 1995, if their homes submitted an application for licensure prior to July 1, 1995. Id.

**14.** The HMR Reform deadlines placed the plaintiff children "in an impossible situation." App. 70a. Due to the DCFS practice of channeling relative foster children away from licensure, virtually all such children lived in approved or preapproved homes in the weeks before the effective date of HMR Reform. See ¶9, supra. In order for these children's benefits to continue, their homes had to apply for and be determined eligible for a license by the applicable deadlines. See ¶13, supra. However, owing to the number of the resulting license applications (see ¶¶ 1, 3, 9 supra), the usual lengthy delays attending the licensure process (see ¶5, supra), and DCFS' delay in issuing notices and applications (App. 61a-62a), "there [was] simply no way that DCFS [would] be able to process all the applications for licensure in time to prevent the loss of substantial foster care benefits to these [children]" (App. 70a), even though "many" of the

children's homes in fact "satisf[ied] the requirements for licensure". App. 64a.

**C. This Litigation**

**15.** On August 24, 1976, the district court entered a final Judgment and Order in this action (the "1976 Order") (App. 90a-98a), pursuant to its Memorandum Opinion of July 27, 1996. 431 F. Supp. 40 (N.D.Ill. 1976). The court of appeals affirmed. 562 F.2d 483 (7th Cir. 1977). On plenary review, this Court unanimously affirmed the judgment of the court of appeals. Miller v. Youakim, 440 U.S. 125 (1979).

**16.** In May 1995, plaintiff class member children and their relative foster parents filed a motion to find the Director in civil contempt of the 1976 Order. App. 48a. Later, in light of the passage of P.A. 89-21, they filed a supplemental motion for declaratory and injunctive relief pursuant to 28 U.S.C. §§2201, 2202. Id. They did not attack the substantive changes in HMR Reform, but the procedures for transition from providing full foster care benefits to children in unlicensed relative homes to providing full foster care benefits only to children in licensed homes. App. 48a, 51a, 72a, 74a. In both motions, the children alleged that these transition procedures disfavored the relative foster children currently receiving benefits in unlicensed homes, on the basis of their status as relatives, in violation of their rights under the 1976 Order and Title IV-E, and that the procedures deprived them of a protected property interest in continued receipt of full foster care benefits, in violation of their rights under the Due Process Clause of the Fourteenth Amendment. App. 51a.

**17.** On June 30, 1995, the district court, following a two-day evidentiary hearing (App. 49a), issued a Memorandum Opinion and Order (the "June 30 Order"). App. 47a-89a. The court held that the HMR Reform transition process violated the rights of the plaintiff children in approved and preapproved homes alike under: ¶4 of the 1976 Order (App. 67a-72a); Title IV-E (App.72a-74a); and the Due Process Clause of the Fourteenth Amendment (App. 74a-81a). It found that the entire HMR Reform transition process (see ¶¶13, 14, supra), which put only relative foster homes in the "impossible situation" of having to secure a license under the new licensing standards by the licensing deadlines, "deliberately disfavor[ed] relative caregivers [and

children]." App. 70a. The district court enjoined the Director from terminating the plaintiff children's full foster care benefits on the deadline dates unless DCFS had first afforded them an adequate opportunity to apply for licensure, and the agency had determined their applications on the merits. App. 88a-89a.

**18.** The Director appealed, and on September 27, 1995, the court of appeals heard oral argument. App. 1a. The next day, the Director announced that he was extending the September 30, 1995, HMR Reform licensing (benefit cut-off) deadline for the children in approved homes to January 1, 1996. App. 3a n.1.

**19.** On December 6, 1995, the court of appeals ruled (App. 1a), affirming the June 30 injunction, with one modification directing the district court to strike those aspects of the injunction that mandated a specific relief procedure, in order to permit the Director initially to propose his own. App. 44a. The court held that the HMR Reform transition process violated the rights of children in approved homes under the 1976 Order and under Title IV-E. App. 22a-26a. It also held that the transition process violated the rights of children in approved and preapproved homes under the Due Process Clause. App. 30a-40a.

**20.** On December 21, 1995, the district court modified the June 30 injunction in obedience to the court of appeals' mandate. Supp. App. 13a.

**21.** On January 17, 1996, the court of appeals denied the Director's petition for rehearing with suggestion for rehearing *en banc*, no participating judge in active service on the court of appeals having requested a vote on the suggestion. App. 46a.

**22.** During the pendency of the appeal, two appellate panels entered three orders staying the June 30 Order in whole or in part. Order (July 12, 1995) (Supp. App. 14a); Order (October 10, 1995) (Supp. App.15a-16a); Order (December 21, 1995), Supp. App. 17a-18a. Under the protection of these stay orders, the Director terminated full foster care benefits effective July 1, 1995, for all the children living in preapproved homes. App. 26a n.12. The court of appeals vacated the last of these stay orders when it denied the Director's petition for rehearing. App. 46a.

**23.** On February 5, 1996, Justice O'Connor denied the Director's Emergency Application To Stay [The Court Of Appeals'] Mandate Affirming Injunction...Pending Certiorari (the "Stay Application"). See Pet. at 8, n.3.

**24.** On February 16, 1996, the district court entered an Interim Injunctive Order (the "Interim Order"). Supp. App. 19a-43a. Among other things, the Interim Order reinstated benefits to all the plaintiff children in preapproved homes whose benefits DCFS had terminated (and had not previously reinstated) and established a license application process for children living in such homes if the homes had not previously filed such applications. Interim Order at ¶¶3-10, Supp. App. 21a-31a.

**25.** In the district court, the parties have submitted competing proposed Final Judgment Orders addressing the relief issues the Interim Order left unresolved. See Order (April 29, 1996), Supp. App. 44a. The principal remaining relief issue involves the provision of "restoration payments", which are payments meant to cover the benefits the children in preapproved homes lost after entry of the June 30 Order but during the pendency of the court of appeals' stay orders. See ¶22, supra. The district court has set July 3, 1996 as the ruling date on the parties' competing proposed orders. Order (May 3, 1996), Supp. App. 44a.

## REASONS WHY THE PETITION SHOULD BE DENIED

In his petition, the Director obfuscates the controversy between the parties, which involves only the legality of a short-term transition process that implements Illinois' substitution of one set of eligibility rules for foster care benefits for another -- a transition process that, moreover, will be nearly complete before this Court could decide this case on the merits. He also obfuscates the plaintiff children's claims and the rulings below: the children never challenged, and the decisions below never invalidated, any of the substantive changes in the state's foster care program that the Illinois legislature made in redefining the program's eligibility rules. Along with these obfuscations, the Director mischaracterizes the court of appeals' constitutional ruling and then attacks it as in conflict with decisions of this Court, particularly Atkins v. Parker, 472 U.S. 115 (1985). See §I, infra. This argument studiously avoids reckoning with the court of appeals'

actual constitutional ruling, which is clearly correct, and with the factual findings on which it rests, which the Director has not challenged here or below. See §§I, II, infra. Neither the factual record nor the decision below even raise the Question Presented in the petition. See §II., infra.

No less that 13 federal judges have rejected the same mischaracterizations and arguments the Director makes in the petition. See App. 29a-40a, 44a (three-judge panel decision unanimously affirming district court's constitutional ruling); App. 46a (unanimously rejecting the Director's petition for rehearing en banc, none of the 10 participating appellate judges, including two from the original panel, having requested a vote on the suggestion for rehearing en banc); Order, No. A-618 (U.S. Sup. Ct. February 5, 1996) (O'Connor, J) (denying Director's Stay Application). This suggests that the Director has a more difficult than usual task if he is to persuade this Court that the court of appeals decided an "important question of federal law in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c).

Aside from the Director's failure to show any conflict between the court of appeals' decision and the decisions of this Court, there are independently sufficient reasons to deny the petition. First, this short-term controversy between the parties is unlikely to be repeated in Illinois or elsewhere and likely nearly to be concluded before this Court could rule on the merits. See §III, infra. There are also meritorious non-constitutional grounds for affirming the lower court's judgment, so that this Court would be likely not to reach the Question Presented if it did grant the petition. See §IV, infra.

## I. THE COURT OF APPEALS DID NOT DECIDE ANY QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THIS COURT

Procedural due process analysis comprises two inquiries: whether plaintiffs have a protectable property interest, and, if so, what process is due before the state may deprive them of that interest. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). The Director argues that the court of appeals' ruling presents a conflict with decisions of this Court as to both inquiries. This argument fails.

### A. The Court Of Appeals' Ruling That The Children Had A Protectable Property Interest Is Entirely Consistent With The Decisions Of This Court

The Director contends that, as a result of Illinois having "eliminate[d]" its program providing "foster care payments to unlicensed homes", all of the plaintiff children became mere "'applicants'" for foster care benefits under "another [foster care] program for which recipients could still apply." Pet. at 16. And "'applicants'" for public assistance benefits, he points out, unlike benefit recipients, have no "'legitimate claim of entitlement'" to benefits while the application is pending. Pet. at 16 (quoting Lyng v. Payne, 476 U.S. 926, 942 (1986)). The foster children here, he concludes, therefore had no "protected [property] interest" in the benefits they were seeking. Pet. at 17.

Illinois did not eliminate a foster care benefits program; it simply amended one of the eligibility requirements for continued full foster care benefits, whether federally-assisted or only state-funded. App. 10a, 38a-39a. Whereas, prior to the effective date of HMR Reform, a relative foster child could qualify for full foster care benefits if the foster home was "approved" or "preapproved", after HMR Reform a relative foster child could only qualify for full foster care benefits if the relative foster home was "licensed". App. 5a-12a. See Statement ¶¶3, 10, supra. After HMR Reform, as before, if a child meets the eligibility requirements for full foster care benefits, including the HMR Reform amended licensure requirements, the child can qualify for such benefits, with or without federal reimbursement. See Statement ¶11, supra. Children whose homes the state determines to meet the licensure requirement, but not other federal requirements, continue to qualify for full (entirely state-funded) foster care benefits. See Statement ¶11(b), supra. The court of appeals understood this. App. 38a ("HMR Reform merely imposes an additional eligibility requirement").

Also, the factual record conclusively establishes that the children in preapproved homes were not mere applicants for benefits; they were recipients of full foster care benefits under an ongoing foster care program who challenged the termination of those benefits. App. 52a, 59a-60a. See Statement ¶¶6, 11-13, 16. The court of appeals understood this, too. App. 32a

("Plaintiffs therefore have a legitimate claim of entitlement to the foster care benefits they were receiving prior to the implementation of HMR Reform") (emphasis added).

The Director contends that the appellate court's reasoning was based on the idea that currently unlicensed homes "had a constitutionally protected interest in applying for a foster care license." Pet. at 16 (not citing to appellate court opinion)(emphasis added). This contention misidentifies the interest that the children claimed, and the court of appeals found, was constitutionally protected: the children's interest, as recipients of full foster care benefits, in their continued receipt of such benefits under the ongoing Illinois foster care program. App. 30a-32a (citing Goldberg v. Kelly, 397 U.S. 254 (1970)).

The Director also contends that the court of appeals' holding that the children had a "protected [property] interest" conflicts with this Court's decisions in Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests ...are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"), and Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985) (quoting Roth). See Pet. at 14-17. But cases like Roth teach only that, when a state creates a property interest, it also has plenary power to eliminate or define away that interest.[2] If Illinois had simply eliminated its foster care program, thereby terminating all benefits under it, and had the children then challenged that action, Roth would defeat the children's claim. Illinois did not eliminate its foster care program or define away the children's protected property interest in foster care payments. Rather, it

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2 In arguing that the court of appeals erred in finding the children to have a protectable property interest in their continued receipt of foster care benefits, the Director suggests that these benefits were, for all the children, "State-created and State-funded". Pet. at 15. See id. at 14-16. As the court of appeals recognized, however, children living in approved homes had been determined eligible for and were receiving federally-reimbursed foster care benefits under Title IV-E. App. 22a-24a. Illinois has no authority to define away those children's entitlement to these federally-created foster care benefits. Youakim, 440 U.S. at 132-43. Moreover, contrary to the Director's suggestion (Pet. at 15-16), the court of appeals' constitutional ruling was not limited to DCFS' deprivation of the children's "State-created and State-funded benefits". Pet at 15. The court held that the agency had also unconstitutionally deprived the children who lived in approved homes of their federally-created and federally-funded benefits. App. 39a-40a.

afforded continued full foster care benefits to all children receiving them if the state determined (by set deadlines) that they remained eligible for them. See p. 11 supra, Statement ¶11, supra.

The Director's contention that the children were mere "applicants" for foster care benefits under a "different program" (Pet. at 16; see Pet. at i), is merely a new rhetorical version of the contention he pressed in the court of appeals that the children had no protectable property interest "because the State of Illinois eliminated [it]". App. 31. For it is the "elimination" of the entitlement that, under the Director's analysis, turns the children from recipients into "applicants" under "another program". Pet. at 16. The court of appeals correctly rejected as "tautological" the Director's contention that the enactment of HMR Reform eliminated the children's protectable property interest. App. 31a (citing Loudermill, 470 U.S. at 541). The court explained that "[a] state...may not defend against a due process claim, as the Director does here, by arguing that the plaintiff now lacks a protectable property interest by virtue of the very state ...[procedures] the plaintiff has challenged". Id. 32a (citing Logan, 455 U.S. at 431-32).

### B. The Court Of Appeals' Ruling As To The "Process Due" The Children Is Entirely Consistent With The Decisions Of This Court

The Director also claims that the court of appeals erred in holding that the enactment of P.A. 89-21 did not afford all the "process due" the children prior to the termination of their property right to continued foster care benefits. Specifically, he insists (Pet. 12-13, 17-23) that the children's challenge to the benefit cuts here is just like that of the plaintiff public assistance recipients in Atkins, where this Court held that the "'legislative determination provides all the process that is due.'" 472 U.S. at 130 (citation omitted). That contention is paired with his insistence that the children's claim is unlike the one this Court ratified in Logan. Pet. at 21-22.

In Atkins, the Court noted that the legislature has "plenary power" to make a "substantive change in the scope of the entire [benefit] program", and that the "'legislative determination provides all the process that is due'" for benefit changes that are the "direct consequence" of this plenary power. Atkins, 472 U.S. at 129-30. It applied these two principles to reject a due process challenge to a "reduction in the level of petitioners' benefits [that] was the direct

consequence" of such a "substantive change." Id. (emphasis added). The "substantive change" in question was a congressional amendment to the Food Stamp Act reducing the earned income disregard applied to calculate benefits under the Food Stamp program. Id.; 472 U.S. at 118.

Under the statute at issue in Logan, Illinois terminated pending employment discrimination claims if it did not act on them by a 120-day deadline. 455 U.S. at 427. A former employee whose claim the State dismissed when it (the State) did not meet the deadline argued that the dismissal violated his due process rights. Id. The defendant employer argued that the statutory deadline was itself a "substantive element" of the state-created entitlement subject to the legislature's plenary power. Id. at 433. This Court rejected this argument, ruling instead that the 120-day deadline, was "a procedural limitation on the claimant's ability to assert his rights." Id. The Court invalidated this "procedural limitation", holding that the Due Process Clause prohibited termination of pending discrimination claims based on the statutory deadline. It required the defendant agency instead to "consider the merits of...charge[s], based upon the substantiality of the available evidence, before deciding whether to terminate [such] claim[s]." Id. at 434. The Court observed that "'[w]hile the legislature may elect not to confer a property interest,...it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'" Id. at 432 (citations omitted).

Atkins and Logan establish that, in procedural due process challenges to benefit terminations in public assistance programs, there is a dispositive distinction between challenges to benefit changes that: (1) are the "direct consequence" of the legislature's "plenary power" to make "substantive change[s]" in the program (Atkins, 472 U.S. at 129-30); and (2) are not the direct consequence of any substantive change in the program, but of procedures applied to effect the substantive program change. Logan, 455 U.S. at 432-34. The former challenges are subject to the Atkins rule that the legislative determination provides all the process that is due. The latter are not, because they contest the adequacy of the procedures the state is employing to terminate a protected property interest, and not the legislature's plenary power substantively to amend or eliminate a statutory entitlement program. Id., 455 U.S. at 432-34.

The Director's analogy between this case and Atkins rests on two faulty factual premises. The first premise is that P.A. 89-21, enacting HMR Reform, "terminate[d] a statutory entitlement program." Pet. at 17. Accord, id. at 13, 15, 16, 21 ("eliminat[ion]" or "terminat[ion]" of a foster care "program"). For his analogy to Atkins to hold, the Director must show that HMR Reform under P.A. 89-21 legislatively eliminated a foster care program. Only then can he analogize the termination of the children's full foster care benefits under HMR Reform to the sort of "substantive [legislative] change in the scope of the entire program" that the Court in Atkins held did not require procedures beyond the legislative determination itself. Atkins, 472 U.S. at 129-30.

The Director's first premise is false. HMR Reform did not eliminate a foster care benefits program; it simply amended one of the eligibility requirements for continued full foster care benefits, whether federally-assisted or entirely state-funded. App. 10a, 38a-39a. See Statement ¶¶10, 11; p. 11, supra.

The Director's second factual premise is that the children's "foster care payments...were not eliminated as the result of a 'procedural limitation', [but]... as the result of the legislature's substantive decision to eliminate the program providing such payments to unlicensed caregivers." Pet at 21-22. The Director needs to prove that the reductions are a "direct consequence" of the "substantive decision" in order for his Atkins analogy to hold. Atkins, 472 U.S. at 129-30.

As noted, the Illinois legislature did not make a substantive decision to eliminate any foster care program. That fact aside, the district court found, as a matter of fact, that the benefit terminations that the children challenged were a direct result of the procedures that the children attacked, particularly the licensing deadlines. App. 60a, 62a, 64a-66a. See P.A. 89-21 (Supp. App. 4a-6a) (establishing procedural deadlines and dictating termination of children's benefits on those deadlines regardless of whether DCFS had determined children's homes' licensing applications on their merits); App. 39a (HMR transition process is "fundamentally flawed ...in that it sanctions the elimination of benefits on a specified date even where a home has submitted a timely application and the Department has yet to render a decision"); App. 81a (noting "[t]he

deadline date, on which Plaintiffs' property interest is destroyed"). Under the HMR transition process, DCFS' licensing procedures made it impossible for DCFS to "render decisions on the applications for licensure that will be pending on July 1, 1995, in time to prevent the deprivation of benefits to many applicants who satisfy the requirements for licensure." Id. at 64a. See App. 70a ("simply no way that DCFS will be able to process all the applications for licensure in time to prevent the loss of substantial foster care benefits to these homes"). Indeed, DCFS never intended even to try to process applications before the deadlines, which were set to coincide with the fiscal year, not with any processing capabilities. Pet. at 22. DCFS made no efforts to process applications of preapproved relative homes for a license by July 1, 1995. App. 40a ("no transition process was provided to these children"). All of the children in preapproved homes were cut off from foster care benefits as of that date. App. 26a n.12.

A development in this case during the pendency of the appeal demonstrates conclusively that the challenged benefit terminations were the "direct consequence" of the HMR Reform procedural licensing deadlines. On the day following the appellate argument, the Director extended the licensing (benefit cut-off) deadline for children living in approved but not yet licensed relative homes from September 30, 1995, to January 1, 1996. App. 3a n.1. Neither the "legislature's substantive decision" (Pet. at 21-22) to stop paying full foster care benefits to children in unlicensed homes, nor the substantive licensing requirements, nor any other substantive aspect of HMR Reform had changed. The Director changed only the procedural limitation the legislature had established (the September 30 cut-off deadline), and he did so without any new legislative authority. As a result of this change in the procedural deadline, the children's benefits, which DCFS would have terminated on September 30, 1995, were not terminated. Thus, the challenged terminations were ones directly resulting from the deadlines dates, and not any legislatively-mandated substantive change in the foster care program.

The children have "readily concede[d] that the Illinois General Assembly may restrict foster care benefits to children in licensed homes", i.e., to homes meeting the Illinois legislature's more stringent licensing standards. App. 34a. A cutoff of benefits following a final administrative

determination that the home did not meet these new substantive standards would be the "direct consequence" of the legislature's substantive decision to amend the standards. In contrast, benefit terminations the children would suffer before DCFS finally determined whether their homes met the new substantive licensing requirements logically could not be the "direct consequence" of the new substantive requirements, since those requirements had yet to be applied to the homes.

The facts of Atkins itself defeat the Director's reliance on that case. In Atkins, the plaintiffs who sought procedures in addition to the legislative "determination" had income at the levels the substantive statutory amendment dictated should directly result in benefit reductions, and this Court held that these additional procedures were not constitutionally required. Atkins, 472 U.S. at 129-31. But the state afforded the food stamp recipients, "before any loss of benefits occurred", an opportunity to contest in a fair hearing the state's determination that their incomes were in fact at the level at which the substantive statutory amendment dictated the threatened reduction or termination of benefits. 472 U.S. at 128. The recipients in Atkins therefore were afforded "an opportunity to present [their] case[s] and have [their] merits fairly judged", Logan, 455 U.S. at 433, when they were in a position to present facts that, if proven, would entitle them to continued receipt of their full food stamp benefits (e.g., mistaken earnings reports or benefit calculations). The state did not offer the same procedural opportunity to recipients who made no claim that the state had mistakenly determined their income or made an "inadvertent [factual] error in calculating [the] benefits" owed under the amended rule. Atkins, 472 U.S. at 128. Their attempt to oppose the benefit changes on due process grounds because they had not been provided with a "better" notice amounted to no more than a futile challenge to benefit reductions and terminations that were the "direct consequence of the [substantive] statutory amendment" Congress had enacted. Id. at 130. As to these benefit reductions and terminations, no evidence the Atkins recipients could have presented could have changed the effect of the substantive statutory amendment on their benefits. The "'legislative determination [had] provide[d] all the process that... [was] due.'" Id. (citation omitted).

The children here are in a position to present facts that, if proven, would entitle them to

continued receipt of full foster care benefits. App. 38a (the "additional eligibility requirement... necessarily requires the State to determine whether existing recipients can meet the new requirement"). Indeed, the district court found, as a matter of fact, that "it is a certainty that many approved homes meet the standards for licensure," and that a "substantial number" of preapproved homes did as well. App. 66a. The children sought, and the court of appeals approved, only an "opportunity to present [their] case[s] [for licensure] and have [their] merits fairly adjudged... based on the substantiality of the available evidence, before ...terminat[ing] [their] claim." Logan, 455 U.S. at 433; App. 39a. This was the same opportunity the state afforded the recipients in Atkins who were in a position to present facts that, if proven, would entitle them to continued full food stamp benefits. The children therefore seek no more "process" than was "due" and provided the plaintiffs in Atkins.

To be sure, many decisions of this Court uphold substantive legislative determinations in statutes against procedural due process challenges. See Atkins, 472 U.S. at 129-30; Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). And virtually all statutes, including the one at issue in Atkins and P.A. 89-21, are, by their nature, "class-wide". The Director seizes upon the "substantive" and "class-wide" characteristics of P.A. 89-21 to argue that it passes constitutional muster and the court of appeals erred in holding otherwise. Pet. at 18-19. See id. at 26. But cases like Atkins and Bi-Metallic uphold "class-wide legislative decisions" against procedural due process challenges when the challenge is to a substantive aspect of the decision--not, as in Logan and here, when it is to the statute's constitutionally infirm "procedural limitation[s]". Logan, 455 U.S. at 433. The Director mistakenly interchanges the characteristics of cases like Atkins and Bi-Metallic (often involving "legislative decisions" that are "class-wide") for the legal analysis. Compare Atkins with Goldberg, 397 U.S at 256-259 & n.5 (invalidating "class-wide" legislative determination and implementing state agency procedures that public assistance recipients were entitled only to a post-termination fair hearing to challenge benefit terminations) and Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995), discussed at App. 35a-38a.

While the Director's Atkins analogy falters on faulty premises and his confused reading of

the case law, the analogy the court of appeals recognized between the challenged statute in Logan and P.A. 89-21 is striking. In Logan, this Court held the Illinois statute at issue unconstitutional, since the "Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged", 455 U.S. at 433, and the statutory termination of the pending employment discrimination claims because the state did not convene a fact-finding conference within the 120-day deadline deprived employment discrimination claimants of that opportunity. Id. at 433-38. Here, the court of appeals, applying the same due process rule, found P.A. 89-21 constitutionally infirm, precisely because it terminated the benefits of the children without first giving them "the opportunity to have a license application considered and determined on its merits." App. 40a.

The Director attempts to evade Logan only by quarreling with the district court's factual findings. See Pet. at 21-22. He asserts, without citation to the record, that, in contrast to the situation in Logan, the applicable licensing deadlines here were "not... 'procedure[s]' for 'determining the preconditions to adverse official action.'" Pet. at 22 (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980). However, the district court found, as a matter of fact, that, under HMR Reform, DCFS would follow the dictate of P.A. 89-21 and terminate the foster care benefits of all plaintiff children unless, by the applicable licensing deadlines, DCFS had "licensed" the homes in which they lived. App. 59a-60a, 62a. The district court identified these licensure (benefit cut-off) deadlines as chief among the procedures it found unfair. App. 81a. The court of appeals agreed. App. 39a. Logan governs this case. There is no conflict between the court of appeals' decision and any decisions of this Court.

## II. NEITHER THE FACTUAL RECORD NOR THE COURT OF APPEALS' DECISION RAISES THE QUESTION PRESENTED IN THE PETITION

The Director does not assert in this Court that any of the district court's factual findings were clearly erroneous. Similarly, in the court of appeals, he did "not challenge[ ] the district court's findings... ." App. 4a.

The district court's factual findings, and the Director's failure--his inability--to challenge

them, establish that the factual record does not even raise the Question Presented in the petition. Thus, the question the Director presents for review subsumes his contention that the benefit terminations the children challenged were the "direct consequence" (Atkins, 472 U.S. at 130) of substantive changes in the foster care program enacted in the HMR Reform statute. Pet. at i ("State law ...eliminate[d] statutory social welfare benefits on a class-wide basis"). But the court found, as a matter of fact, that the benefit terminations that the children challenged were the direct result of challenged procedures, not of the substantive changes in the foster care program. App. 59a-60a, 62a, 64a-65a. Therefore, the factual record does not raise the Question Presented in the petition.

The Director's position in this Court is akin to that of a litigant appealing from a district court's judgment that a union or an employer is or is not guilty of intentional racial discrimination. See e.g., Goodman v. Lukens Steel Co., 482 U.S. 656 (1987). Unless the appellant in such a case can show that the district court's factual findings underlying this judgment are clearly erroneous, his appeal fails. See id. at 665. So here, unless the Director can persuade this Court that the children's benefit cuts were, as in Atkins, "the direct consequence of [a substantive] statutory amendment," Atkins, 472 U.S. at 130, he cannot carry his argument that the court of appeals' decision conflicts with the ruling in Atkins. But to make that showing, he would have to challenge the district court's factual findings that these cuts were attributable to the HMR Reform procedures, which he has not done here or below.

The Question Presented in the petition is:

> Whether under the Due Process Clause of the Fourteenth Amendment, a State legislature may amend State law to alter or eliminate statutory social welfare benefits on a class-wide basis without first providing current recipients with individual due process determinations on their eligibility for different benefits they have not previously received?

Pet. at i.

The Director maintains that the court of appeals considered this question and ruled against him. Pet. at 10-13, 15-17, 21-23, 25. It did not. To the extent the court of appeals did consider

whether a state legislature may "amend State law" to "eliminate statutory social welfare benefits" (Pet. at i.), it answered that question in the Director's favor. App.31a. The court of appeals also agreed that the state legislature had the power to amend state law to alter or eliminate statutory social welfare benefits on a "class-wide basis" (Pet. at i). See App. 37a.

To be sure, the court of appeals did not expressly affirm that if a state "amend[ed] State law to alter or eliminate statutory social welfare benefits on a class-wide basis," it was not constitutionally obliged to "provid[e] current recipients [of the benefits being eliminated] with individual due process determinations on their eligibility for different benefits they have not previously received." Pet. at i. But this question was not one this case has ever presented, so it is not one that the court of appeals ever addressed. The court of appeals decided the constitutional question the factual record presented, and thus its constitutional ruling raises only the question the children set forth in this brief:

> Whether a state, consistent with the Due Process Clause of the Fourteenth Amendment, may terminate the cash benefits it pays to children under an ongoing social welfare program on the ground that the children had not met a new substantive eligibility requirement by a set transition deadline, when the state has neither considered nor decided on their merits the claims of the children that they in fact meet the new requirement.

Supra at i.

The court of appeals decided this question with reference to the well-established rule that "[o]nce a property interest has been created by a state, that interest may subsequently be eliminated, but only pursuant to constitutionally adequate procedures." App. 31a (citing Loudermill, 470 U.S. at 541). The court of appeals decided only the two issues this Court's due process decisions pose: "first, whether plaintiffs were deprived of a protected property interest, and if so, what process was due them in connection with that deprivation." App. 29a (citing Logan, 455 U.S. at 428). It decided them correctly. App. 30a-32a (holding that the children had a protectable property interest in continued receipt of foster care benefits, citing Goldberg, 397 U.S. at 262, and other cases), see §I.A., supra; App. 39a-40a (holding that the failure to afford the children an "opportunity to have a license application considered and determined on its merits

before the benefits ... may be eliminated" violates the children's rights to due process, citing Logan and several decisions of courts of appeals). See §I.B., supra.

Because the court of appeals did not address any issues about the constitutional power of state legislatures to effect substantive changes in welfare programs, the Director's notion that the ruling will "render state legislatures unable to reform, amend, or even terminate their own social welfare programs" (Pet. at 25), implying that the ruling thus presents an "important" federal question under S.Ct. Rule 10(c), is unfounded.[3] Moreover, state legislatures do not require any "guidance" about their constitutional responsibilities under the Due Process Clause "in connection with welfare reform." Pet. at 26. This Court's decisions set forth the guiding principles. See Logan, 455 U.S. at 428-37 and cases there cited. The court of appeals applied these principles to affirm the June 30 Order. App. at 29a-40a. They require no further "clarification". Pet. at 26.

## III. THIS SHORT-TERM CONTROVERSY IS UNLIKELY TO BE REPEATED IN ILLINOIS OR ELSEWHERE AND IS LIKELY NEARLY TO BE CONCLUDED BEFORE THIS COURT COULD RULE ON THE MERITS

The Article III "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." Lewis v. Continental Bank, 494 U.S. 472, 477 (1990). It follows that a possibility that a case will become moot during the pendency of proceedings in

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3 The Director's suggestion (Pet. at 25-26) that the rulings below have prevented Illinois from implementing the substantive changes the Illinois legislature enacted in P.A. 89-21 is without merit. The relief the district court ordered and the appellate court affirmed did not "interfere in any way with the State's ability to have the HMR Reform take effect on July 1, 1995, including...increased licensure requirements,...and many other changes." App. 85a. In addition to full application of HMR Reform to all new (post-July 1, 1995) cases, of the roughly 26,000 children in the plaintiff class receiving full foster care benefits in unlicensed homes during the pre-HMR Reform regime (see App. 55a), only about 5,000 are still receiving such benefits in such homes (because DCFS has not yet decided the homes' license applications). Specifically, as of March 12, 1996, 2800 license applications remained pending. Affidavit of Mary Sue Morsch, ¶2, Supp. App. 46a. In the next two months (March 12-May 11, 1996), DCFS decided at least 1000 license applications. See p. 24 n.5, infra. But between March 12 and April 8, 1996, approximately 700 license applications were filed pursuant to the Interim Order at ¶¶4, 6 (Supp. App. 22a-27a). Home of Relative Reform Weekly Update (May 3, 1996), Supp. App. 48a (727 applications filed by April 8, 1996, following distribution of applications on February 23, 1996). Therefore, only about 2500 license applications remained pending as of May 11, 1996 (2500 = 2800 - 1000 + 700). Each relative foster home cares for approximately two foster children. App. 54a-56a. Therefore, approximately 5000 children are still receiving full foster care benefits in unlicensed homes.

this Court weighs against a petition for certiorari--the greater the possibility, the greater the weight against the petition. See Taylor v. McElroy, 360 U.S. 709, 711 (1959) (case mooted while pending in this Court when Secretary of Defense granted plaintiff employee "ultimate relief which he demanded").

Even when a case or controversy between the parties will not become moot during the pendency of proceedings in this Court, if it is likely substantially to dissolve during that period, then that likelihood also weighs against granting the petition. For whatever "importance" a question presented for review might have when a petition is filed, see S. Ct. Rule 10(c), the substantial dissolution of the controversy allegedly giving rise to the question makes it much less important, certainly to the litigants themselves, by the time this Court would decide the case.

There is no continuing case or controversy here between the Director and over one-third of the children in the plaintiff class, as he has acknowledged that these children are ultimately entitled to the full relief the court of appeals approved. The Director does not seek review of the court of appeals' ruling, under the 1976 Order and Title IV-E, in favor of the children living in approved homes. Pet. at 5 n.1. This ruling requires the provision of full relief to all these children, if the homes in which they lived filed timely license applications. App. 40a-42a. See Interim Order ¶¶2, 8, Supp. App. 21a, 29a. Approximately 90% of approved homes did file timely license applications (App. 41a, n. 15), so that approximately 10,000 of the slightly more than 11,000 children living in approved homes prior to the effective date of HMR Reform (App. 55a) will be afforded full relief here (even though they may not have been afforded full relief as yet), regardless of whether or how this Court resolves the Question Presented in the petition.

The record, in any event, establishes that the Director is likely to have afforded full relief to most of the plaintiff children before the winter of 1997, which is the earliest this Court is likely to decide this case should it grant the petition.[4] Thus, under the court of appeals' ruling, full

4 Assuming that this Court grants the petition this term, it seems unlikely that it will schedule argument until at least November or December 1996. This makes doubtful any decision on the merits until the winter or spring of 1997.

relief to the plaintiff children is the provision to them of an adequate opportunity to have a license application "considered and determined on its merits before...[their] benefits...may be eliminated". App. 40a. See December 21, 1995 Order, Supp. App. 13a (incorporating this directive); Interim Order ¶¶4, 6 (establishing license application process in compliance with this directive). Cf. n.7, infra (discussing restoration payment relief). By March 29, 1996, DCFS had already afforded more than 10,000 children this opportunity, by deciding on the merits their homes' license applications. HMR Weekly Update (March 29, 1996), Supp. App. 49a. DCFS has decided over 1000 additional applications since then. See n.5, infra. Finally, approximately 1800 relative homes (caring for 3600 children) "did not respond" to the opportunity afforded them by the Interim Order at ¶¶4,6 to file license applications. HMR Weekly Update (May 3, 1996), Supp. App. 48a. The only plaintiff children currently living in relative foster homes (that they lived in prior to HMR Reform) to whom DCFS has not yet afforded this opportunity are the approximately 5000 children whose license applications still remain pending. See p. 22 n.3, supra (2500 pending license applications as of May 15, 1996). DCFS is processing license applications under HMR Reform at the rate of approximately 572 applications per month.[5] At that rate, it should take 4.4 months from May 15, 1996, or until approximately September 27, 1996, for DCFS to finally determine all the applications pending as of May 15, 1996.[6] DCFS should also provide all "restoration payment" relief (see Statement ¶25, supra) well before winter 1997.[7]

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5 Between July 1, 1995 and March 29, 1996, DCFS finally determined 5148 license applications. HMR Weekly Update (March 29, 1996), Supp. App. 49a. This is a rate of 572 determinations in each of these nine months.

6 Drawing on the figures set forth at p. 22 n.3, supra, approximately 2500 applications remained pending as of May 15, 1996. At the rate of 572 determinations per month (see n.5, supra), these applications should be disposed of in 4.4 months.

7 The district court's July 3, 1996, ruling will resolve the issue of restoration payment relief. See Statement ¶25; Supp. App. 44a. After entry of the Interim Order on February 16, 1996, DCFS reinstated benefits to the approximately 9000 children entitled to them within one week, by February 23, 1996. Supp. App. 50a; See Interim Order ¶5, Supp. App. 24a-25a. Even if making restoration payments takes many more months than the massive reinstatement did--and there is no good reason why that should be--DCFS would provide all the restoration payments before the winter of 1997.

To be sure, "administrative difficulties at DCFS" (App. 58a), and the possibility that some foster parents will appeal adverse licensing decisions, see App. 43a-44a, make it likely that some fraction of the license applications will remain unresolved by September 27, 1996, and for some months afterwards. So, while it is possible that full relief will have been provided to all the plaintiff children by the time this Court could decide this case on its merits, thus mooting the case, it is more likely that there will remain a continuing case or controversy between the Director and some (albeit relatively few) of the children until any decision on the merits here. The case or controversy that would remain as of the date of decision, however, would represent merely the residue of this litigation, making it unworthy of this Court's attention.

That so little will likely remain of this case by the winter or spring of 1997 reflects that the entire controversy between the parties involves only the legality of a short-term transition process that implements Illinois' substitution of one set of eligibility rules for another. See Statement ¶¶10, 11, supra. By definition, this particular process will never be replicated for the Illinois foster care program itself, a foster care program that has been "nearly unique" all along. Pet. at 15. Moreover, the Director cites, and the children are aware of, no examples of any other state that is implementing or plans to implement new eligibility rules for an ongoing social welfare program pursuant to the type of transition process the court of appeals held unconstitutional.

All these factors weigh against treating as "important" under S. Ct. Rule 10(c) the Question Presented in the petition. They offer substantial grounds for denying the petition, even if the court of appeals' constitutional ruling were in conflict with the decisions of this Court.

## IV. THE 1976 ORDER AND TITLE IV-E PROVIDE ALTERNATIVE NON-CONSTITUTIONAL GROUNDS FOR AFFIRMANCE

There are meritorious non-constitutional grounds for affirming the court of appeals' judgment. These grounds offer still another basis for denying the petition, for they make it unlikely that this Court would reach the constitutional question the Director presents if it did grant the petition. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring).

The district court afforded all the plaintiff children the same relief based on their claims under the 1976 Order and Title IV-E as it did on their claim under the Due Process Clause. App. 82a-84a. The court of appeals, however, affirmed the district court's non-constitutional (1976 Order and Title IV-E) ruling only as to children living in approved homes. App. 15a-29a. In contrast, it affirmed the district court's due process ruling--and the relief accompanying it--as to children in approved homes and preapproved homes, i.e., all of the plaintiff children. The 1976 Order and Title IV-E therefore offer alternative non-constitutional grounds for affirming the court of appeals' judgment in favor of the children.[8]

Paragraph 4 of the 1976 Order forbids the Director from "'enforcing [Illinois law] and all implementing policies and procedures, insofar as they exclude from eligibility, or deny full [Title IV-E] payments...to [relative] foster children,...when such children...are otherwise eligible for such payments... .'" App. 20a (quoting ¶4, emphasis added). Drawing on the emphasized language, the Director successfully argued to the court of appeals that, because children living in preapproved homes did not reside in "foster family homes" within the meaning of 42 U.S.C. §672(a)(3), they were not "otherwise eligible for...full [Title IV-E] payments" within the meaning of ¶4 and could not claim that provision's protection. App. 28a-29a. See Statement ¶¶3, 4, 7, 11(a) supra (explaining that a "foster family home" under Title IV-E is a home that the state has licensed or approved as meeting its licensing standards, while a preapproved home has had a "safety check" but has not been licensed or approved). By the same token, the court of appeals concluded, the children in preapproved homes could claim no protection under Title IV-E itself. App. 28a-29a. It reasoned that, as Title IV-E did not provide for benefits on behalf of children not living in a "foster family home" as defined by 42 U.S.C. §672(c), these children were "entitled to no relief under...the Social Security Act." App. 29a.

Under the Director's argument and the court of appeals" ruling, only children already

8 Because the Director does not challenge the court of appeals' non-constitutional ruling (Pet. at 5 n.1), regardless of the outcome of his challenge to its constitutional ruling, the relief afforded to the children living in approved homes will stand. See p. 23, supra.

determined eligible for Title IV-E benefits, by virtue of the "licensure" or formal "approval" of the foster home in which they are living, may claim the protection of either ¶4 of the 1976 Order or Title IV-E. Put differently, the court of appeals' ruling limited the reach of both the 1976 Order and Title IV-E to recipients of Title IV-E benefits, i.e., recipients of full foster care benefits for which Illinois receives federal reimbursement, as distinguished from applicants for federally-reimbursable benefits. See Statement ¶12, supra.

### A. Children In Preapproved Homes Were Entitled To Relief Under The 1976 Order

Paragraph 4 itself establishes that the reach of the 1976 Order is not limited to recipients of federally-reimbursable Title IV-E benefits, but includes applicants for them. That provision forbids the Director from "enforcing [Illinois law] and all implementing policies and procedures, insofar as they exclude from eligibility, or deny full [Title IV-E] payments" to relative foster children based on their "relative" status. App. 93a (emphasis added). The emphasized language cannot be squared with the conclusion that the 1976 Order does not protect applicants for Title IV-E benefits, for it is only applicants for benefits, never recipients of them, who may be "exclude[d] from eligibility". App. 93a. Reading ¶4 of the 1976 Order not to reach "applicants" therefore reads the prohibition against "policies and procedures" that effect "exclu[sions] from eligibility" out of the provision entirely.

The reference in ¶4 to children who are "otherwise eligible" for full foster care payments does not save the Director's reading of that provision. Reading "otherwise eligible" to require that, to claim the protection of ¶4, relative children must already have been determined eligible for IV-E benefits would validate a state statute that provided that "relative foster children are prohibited from applying for Title IV-E benefits." The same reading would validate an administrative policy that either delayed or held back entirely the processing of applications from relative foster children--thereby "exclud[ing] from eligibility" (App. 93a) some or all relative children based on their relative status. Yet neither of these results could conceivably be squared with the prohibition in ¶4 against "exclusions" of relative foster children from eligibility for Title

IV-E reimbursement.

When this litigation was filed in 1973, DCFS had denied the two named plaintiff Robertson children living in the Youakim home federal foster care benefits, finding them ineligible for the program. Youakim, 440 U.S. at 130. For class membership (indeed class representative) purposes, these children were nonetheless covered under the 1976 Order, which this Court affirmed. Id. at 133-34, 145-46. Yet the court of appeals' reading of the 1976 Order would suggest that these children (the named plaintiffs) could not legitimately claim the protection of that order, because, for lack of the "licensure" or formal "approval" of the Youakim family home, they had not been already determined eligible for IV-E benefits.[9]

**B. Children In Preapproved Homes Were Entitled To Relief Under Title IV-E**

The court of appeals correctly read Title IV-E not to confer cash benefits on children who do not live in a "foster family home". See 42 U.S.C. §672(a)(3). But it does not follow that children who have no statutory right to benefits under Title IV-E thereby have no other rights under that statute. Nor does it follow that these other rights do not give rise to the relief the

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9 The court of appeals suggests that the Robertson children would be "otherwise eligible" for benefits under its reading of ¶4 because the Youakim home, "ha[d] been approved" by DCFS as "meeting the licensing standards of the State of Illinois." App. 27a (emphasis in original). This suggestion mistakenly equates the term "approv[al]" used by this Court in 1979 with "approval" in 1995. But the Youakim home's "approval" form reveals the mistake. 440 U.S. at 130, n. 8. The Relative Home Placement form, which this Court referred to as the "document[ation]" of approval (id.), was completed on the very same day that DCFS first placed the Robertson children in the Youakim home. 1/7/72 Relative Home Placement Agreement for Timothy Robertson, Attachment I to Verified Complaint (filed March 13, 1973) ("1/7/72 Form"), Supp. App. 51a-52a. This form documents no more substantial a process than the preliminary "safety check" and placement documentation required for preapproval in 1995. Compare 1/7/72 Form with Relative Home Placement Agreement (Supp. App. 58a-59a) attached to Def. Ans. to Plaintiffs' First Interrogatory 4(a), Supp. App. 54a-56a. Compare also, Youakim, 440 U.S. at 130 (unspecified "inspection" prior to completion of 1/7/72 Form) with App. 58a, 61a (specific application, fingerprint reading and criminal background check required under approval rule). Nor can the Director argue, without contradicting his earlier representation to the district court, that an "approved" relative home in Illinois in 1972 met "substantially similar" standards as Illinois required for licensure. See Memorandum in Opposition To Further Amendment of Regulation 5.12 (filed 12/10/76) at 2-4, Supp. App. 62a-64a. In sum, the Youakim home's status in 1972 paralleled the status of the "preapproved", not the "approved", homes in 1995. The court of appeals' understanding of ¶4, if applied in 1976, would thus have foreclosed relief to the named plaintiff Robertson children, whose home was, in effect, "preapproved" only.

district court ordered.

In its 1979 ruling affirming the 1976 Order, this Court stated that "Congress intended no distinction between related and unrelated foster homes" under the federal foster care statute, now Title IV-E. Youakim, 440 U.S. at 135 (emphasis added). It did not exempt the application process from the sweep of its ruling. Accord, id. at 141 ("Congress did not intend to distinguish between related and unrelated foster caretakers"). Therefore, while the "Act did not otherwise entitle" children living in preapproved homes to Title IV-E "benefits" (App. 29a), these children did have a right under Title IV-E to an application process for federally-reimbursed benefits that did not exclude them from eligibility because of their relative status. The district court concluded that the HMR license application process did exclude them on this basis. App. 69a-70a. See Statement ¶17.

Since the Director had violated the children's right under Title IV-E to a license application process that did not exclude them based on their relative status, the district court was required to determine "what relief was appropriate." App. 82a. Appropriate relief, the district court concluded, included a directive that DCFS continue to pay these children the entirely state-funded full foster care benefits they were receiving pending a determination on the merits of each child's licensure application, i.e., pending determination of their application for foster care benefits for which the state would receive federal reimbursement. App. 82a-83a. See Statement ¶11, supra. This relief maintained their status quo as recipients of full benefits (state-funded) and kept them in the same position as children in non-relative homes that had not yet proven they met the new HMR substantive licensure standards. See Statement ¶13, supra. This modest relief for the violation of the children's statutory rights was well within the district court's equitable discretion. See Hills v. Gautreaux, 425 U.S. 284, 297 (1976). In the court of appeals, not even the Director argued otherwise. In sum, the children in preapproved homes did have a Title IV-E right (to an application process for federally-reimbursable foster care benefits that did not exclude them based on their relative status), and the relief the district court ordered for violation of this right was appropriate.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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# SUPPLEMENTAL APPENDIX

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97-35 effective Oct. 1, 1981, except as otherwise explicitly provided, see section 2354 of Pub. L. 97-35, set out as an Effective Date note under section 1397 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 652, 658, 664, 666, 672, 677, 1320a-2, 1320a-10 of this title; title 26 section 6402.

**§ 672. Foster care maintenance payments program**

**(a) Qualifying children**

Each State with a plan approved under this part shall make foster care maintenance payments (as defined in section 675(4) of this title) under this part with respect to a child who would meet the requirements of section 606(a) of this title or of section 607 of this title but for his removal from the home of a relative (specified in section 606(a) of this title), if—

(1) the removal from the home occurred pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 671(a)(15) of this title have been made;

(2) such child's placement and care are the responsibility of (A) the State agency administering the State plan approved under section 671 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 671 of this title has made an agreement which is still in effect;

(3) such child has been placed in a foster family home or child-care institution as a result of the voluntary placement agreement or judicial determination referred to in paragraph (1); and

(4) such child—

(A) received aid under the State plan approved under section 602 of this title in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) had been living with a relative specified in section 606(a) of this title within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made.

In any case where the child is an alien disqualified under section 1255a(h), 1160(f), or 1161(d)(7) [1] of title 8 from receiving aid under

[1] See References in Text note below.

the State plan approved under section 602 of this title in or for the month in which such agreement was entered into or court proceedings leading to the removal of the child from the home were instituted, such child shall be considered to satisfy the requirements of paragraph (4) (and the corresponding requirements of section 673(a)(2)(B) of this title), with respect to that month, if he or she would have satisfied such requirements but for such disqualification.

**(b) Additional qualifications**

Foster care maintenance payments may be made under this part only on behalf of a child described in subsection (a) of this section who is—

(1) in the foster family home of an individual, whether the payments therefor are made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payments therefor are made to such institution or to a public or nonprofit private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term "foster care maintenance payments" (as defined in section 675(4) of this title).

**(c) "Foster family home" and "child-care institution" defined**

For the purposes of this part, (1) the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing; and (2) the term "child-care institution" means a nonprofit private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing, but the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.

**(d) Children removed from their homes pursuant to voluntary placement agreements**

Notwithstanding any other provision of this subchapter, Federal payments may be made under this part with respect to amounts expended by any State as foster care maintenance payments under this section, in the case of children removed from their homes pursuant to voluntary placement agreements as described in subsection (a) of this section, only if (at the time such amounts were expended) the State has fulfilled all of the requirements of section 627(b) of this title.

**(e) Placements in best interest of child**

No Federal payment may be made under this part with respect to amounts expended by any State as foster care maintenance payments under this section, in the case of any child who was removed from his or her home pursuant to a voluntary placement agreement as described in subsection (a) of this section and has remained in voluntary placement for a period in excess of 180 days, unless there has been a judicial determination by a court of competent jurisdiction (within the first 180 days of such placement) to the effect that such placement is in the best interests of the child.

**(f) "Voluntary placement" and "voluntary placement agreement" defined**

For the purposes of this part and part B of this subchapter, (1) the term "voluntary placement" means an out-of-home placement of a minor, by or with participation of a State agency, after the parents or guardians of the minor have requested the assistance of the agency and signed a voluntary placement agreement; and (2) the term "voluntary placement agreement" means a written agreement, binding on the parties to the agreement, between the State agency, any other agency acting on its behalf, and the parents or guardians of a minor child which specifies, at a minimum, the legal status of the child and the rights and obligations of the parents or guardians, the child, and the agency while the child is in placement.

**(g) Revocation of voluntary placement agreement**

In any case where—

(1) the placement of a minor child in foster care occurred pursuant to a voluntary placement agreement entered into by the parents or guardians of such child as provided in subsection (a) of this section, and

(2) such parents or guardians request (in such manner and form as the Secretary may prescribe) that the child be returned to their home or to the home of a relative,

the voluntary placement agreement shall be deemed to be revoked unless the State agency opposes such request and obtains a judicial determination, by a court of competent jurisdiction, that the return of the child to such home would be contrary to the child's best interests.

**(h) Aid to families with dependent children**

For purposes of subchapters XIX and XX of this chapter, any child with respect to whom foster care maintenance payments are made under this section shall be deemed to be a dependent child as defined in section 606 of this title and shall be deemed to be a recipient of aid to families with dependent children under part A of this subchapter. For purposes of the preceding sentence, a child whose costs in a foster family home or child-care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent, as provided in section 675(4)(B) of this title, shall be considered a child with respect to whom foster care maintenance payments are made under this section.

(Aug. 14, 1935, ch. 531, title IV, § 472, as added and amended June 17, 1980, Pub. L. 96-272, title I, §§ 101(a)(1), 102(a)(1), (2), 94 Stat. 503, 513, 514; Nov. 6, 1986, Pub. L. 99-603, title II,

§ 201(b)(2)(A), title III, §§ 302(b)(2), 303(e)(2), 100 Stat. 3403, 3422, 3431; Dec. 22, 1987, Pub. L. 100-203, title IX, §§ 9133(b)(2), 9139(a), 101 Stat. 1330-314, 1330-321; Oct. 31, 1994, Pub. L. 103-432, title II, § 202(d)(3), 108 Stat. 4454.)

AMENDMENT OF SUBSECTION (d)

*Pub. L. 103-432, title II, § 202(d)(3), (e), Oct. 31, 1994, 108 Stat. 4454, provided that, effective with respect to fiscal years beginning on or after Apr. 1, 1996, subsection (d) of this section is amended by striking out "section 627(b) of this title" and inserting "section 622(b)(9) of this title".*

20 ILCS 505/5. Direct child welfare services

§ 5. To provide direct child welfare services when not available through other public or private child care or program facilities.

(u–5) Effective July 1, 1995, only foster care placements licensed as foster family homes pursuant to the Child Care Act of 1969 [19] shall be eligible to receive foster care payments from the Department. Relative caregivers who, as of July 1, 1995, were approved pursuant to approved relative placement rules previously promulgated by the Department at 89 Ill.Adm.Code 335 and had submitted an application for licensure as a foster family home may continue to receive foster care payments only until the Department determines that they may be licensed as a foster family home or that their application for licensure is denied or until September 30, 1995, whichever occurs first.

20 ILCS 505/7. Placement; religious beliefs; placement with relative

*Text of section effective until the effective date of P.A. 89-422* *

§ 7. (a) In placing any child under this Act, the Department shall place such child, as far as possible, in the care and custody of some individual holding the same religious belief as the parents of the child, or with some child care facility which is operated by persons of like religious faith as the parents of such child.

(b) In placing a child under this Act, the Department may place a child with a relative if the Department has reason to believe that the relative will be able to adequately provide for the child's safety and welfare. The Department may not place a child with a relative, with the exception of certain circumstances which may be waived as defined by the Department in rules, if the results of a check of the Law Enforcement Agency Data System (LEADS) identifies a prior criminal conviction of the relative or any adult member of the relative's household for any of the following offenses under the Criminal Code of 1961: [1]

(1) murder;

(1.1) solicitation of murder;

(1.2) solicitation of murder for hire;

(1.3) intentional homicide of an unborn child;

(1.4) voluntary manslaughter of an unborn child;

(1.5) involuntary manslaughter;

(1.6) reckless homicide;

(1.7) concealment of a homicidal death;

(1.8) involuntary manslaughter of an unborn child;

(1.9) reckless homicide of an unborn child;

(1.10) drug-induced homicide;

(2) a sex offense under Article 11,[2] except offenses described in Sections 11-7, 11-8, 11-12 and 11-13;



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*[Respondents' Note. P.A. 89-422, signed into law on December 4, 1995, added subsections (c), (d), and (e) to 20 ILCS 505/7; these subsections are not relevant here. P.A. 89-422 did not amend the text of subsections (a) and (b), as amended by P.A. 89-21.]

(3) kidnapping;

(3.1) aggravated unlawful restraint;

(3.2) forcible detention;

(3.3) aiding and abetting child abduction;

(4) aggravated kidnapping;

(5) child abduction;

(6) aggravated battery of a child;

(7) criminal sexual assault;

(8) aggravated criminal sexual assault;

(8.1) predatory criminal sexual assault of a child;

(9) criminal sexual abuse;

(10) aggravated sexual abuse;

(11) heinous battery;

(12) aggravated battery with a firearm;

(13) tampering with food, drugs, or cosmetics;

(14) drug-induced infliction of great bodily harm;

(15) aggravated stalking;

(16) home invasion;

(17) vehicular invasion;

(18) criminal transmission of HIV;

(19) criminal neglect of an elderly or disabled person;

(20) child abandonment;

(21) endangering the life or health of a child;

(22) ritual mutilation;

(23) ritualized abuse of a child;

(24) an offense in any other state the elements of which are similar and bear a substantial relationship to any of the foregoing offenses.

For the purpose of this subsection, "relative" shall include any person, 21 years of age or over, other than the parent, who (i) is currently related to the child in any of the following ways by blood or adoption: grandparent, sibling, great-grandparent, uncle, aunt, nephew, niece, first cousin, great-uncle, or great-aunt; or (ii) is the spouse of such a relative; or (iii) is the child's step-father, step-mother, or adult step-brother or step-sister; "relative" also includes a person related in any of the foregoing ways to a sibling of a child, even though the person is not related to the child, when the child and its sibling are placed together with that person. A relative with whom a child is placed pursuant to this subsection may, but is not required to, apply for licensure as a foster family home pursuant to the Child Care Act of 1969; [3] provided, however, that as of July 1, 1995, foster care payments shall be made only to licensed foster family homes pursuant to the terms of Section 5 of this Act.

Amended by P.A. 89-21, Art. 5, § 5-15, eff. July 1, 1995; P.A. 89-428, Art. 2, § 210, eff. Dec. 13, 1995.

[1] 720 ILCS 5/1-1 et seq.

[2] 720 ILCS 5/11-1 et seq.

[3] 225 ILCS 10/1 et seq.

*For text of section effective upon the effective date of P.A. 89-422, see 20 ILCS 505/7, post.*

*For effective date of P.A. 89-422, see Historical and Statutory Notes, post.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

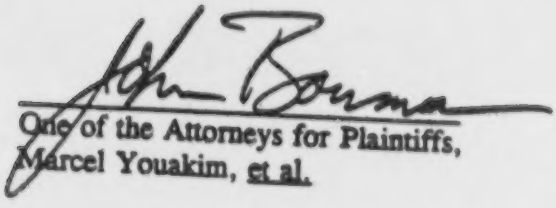
| | | |
|---|---|---|
| MARCEL YOUAKIM, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | No. 73 C 635 |
| | ) | |
| v. | ) | Judge John A. Nordberg |
| | ) | |
| JESS MCDONALD, Director, Illinois Department of Children and Family Services, | ) | |
| | ) | |
| Defendant. | ) | |

## FIRST STIPULATIONS OF UNCONTESTED FACT

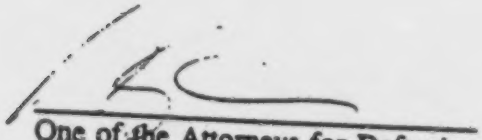
Plaintiffs, Marcel Youakim, et al., and defendant, Jess McDonald, Director of the Illinois Department of Children and Family Services ("DCFS"), through their undersigned counsel, hereby stipulate as follows:

14. Prior to the HMR Reform, DCFS paid the foster care payment rate to relative caregivers for the care of DCFS wards, regardless of the approval, licensing, or Title IV-E eligibility status of the relative home or child.

**So Stipulated:**



One of the Attorneys for Plaintiffs,
Marcel Youakim, et al.



One of the Attorneys for Defendant,
Jess McDonald, Director,
Illinois Department of Children
and Family Services

Dated: Chicago, Illinois
June 1, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| MARCEL YOUAKIM, et al., Plaintiffs | ) | |
| v. | ) | 73 C 635 |
| JESS MCDONALD, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, etc. | ) | Judge Nordberg |
| Defendants. | ) | |

CROSS-EXAMINATION OF MARY SUE MORSCH
TAKEN FROM HER DEPOSITION OF MAY 19, 1995

The plaintiffs designate the attached excerpts from the deposition testimony of Mary Sue Morsch as their cross-examination of Ms. Morsch in this matter.

Respectfully submitted

Michelle Gilbert
One of the Attorneys for Plaintiffs

Dated: June 16, 1995

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STACY PLATT
MICHELLE GILBERT
LEGAL ASSISTANCE FOUNDATION OF CHICAGO
343 S. DEARBORN
CHICAGO, IL 60604
(312) 341-1070

Q Is there any plan in the HMR Reform Plan to change the benefits for licensed relatives depending on whether children were removed from their home or not?

MS. TCHEN: You're talking about people who are currently wards of the state?

MS. REDLEAF: Q Yes, who were not removed from the relative, is there any plan to reduce their

individuals' foster care benefits?

THE WITNESS: A No.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Stuart Cunningham
CLERK

Office of the Clerk

Robert E. Lehrer
Legal Assistance Foundation of Chicago
343 South Dearborn Street
Suite 700
Chicago, IL 60604

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Case Number: 1:73-cv-00635

Title: Youakim v. Miller

Assigned Judge: Honorable John A. Nordberg

MINUTE ORDER of 12/21/95 by Hon. John A. Nordberg : Pursuant to the 12/06/95 order of the Seventh Circuit, the portion of this court's 06/30/95 order that states "until defendants have complied with the instructions of this rt detailed in a memorandum opinion and order issued today" is stricken and replaced with "until defendants have provided plaintiffs with an adequate opportunity to have a license application determined on its merits," so that the terminating, suspending, or reducing foster care payments to relative foster children currently receiving them until defendants have provided plaintiffs with an adequate opportunity to have a license application determined on its merits. Mailed notice

This docket entry was made by the Clerk on December 22, 1995

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

# United States Court of Appeals

*For the Seventh Circuit*
*Chicago, Illinois 60604*

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JUL 14 1995

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

July 12, 1995

*Before*

Hon. RICHARD A. POSNER, *Chief Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

| | |
|---|---|
| MARCEL YOUAKIM, LINDA YOUAKIM, individually, and as foster parents, and TIMOTHY ROBERTSON, and all others similarly situated, Plaintiffs-Appellees, | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |
| No. 95-2575 v. | No. 73 C 635 |
| JESS MCDONALD, Director, Illinois Department of Children and Family Services, Defendant-Appellant. | John A. Nordberg, Judge. |

The following are before the court:

1. MOTION TO STAY INJUNCTION PENDING APPEAL filed 7/5/95, by counsel for the appellant.

2. APPELLEE FOSTER CHILDREN'S MEMORANDUM IN OPPOSITION DEFENDANT-APPELLANT'S MOTION TO STAY INJUNCTION filed 7/12/95, by counsel.

IT IS ORDERED that the motion to stay injunction pending appeal is GRANTED. The district court order is STAYED pending resolution of this appeal or further court order.

DOCKETED
JUL 14 1995

# United States Court of Appeals

*FOR THE SEVENTH CIRCUIT*
*CHICAGO, ILLINOIS 60604*

October 10, *1995*

*Before*

Hon. Harlington Wood, Jr., Circuit Judge

Hon. Ilana Diamond Rovner, Circuit Judge

Hon. Terence T. Evans, Circuit Judge

No. 95-2575

| | |
|---|---|
| MARCEL YOUAKIM, LINDA YOUAKIM, individually, and as foster parents, and TIMOTHY ROBERTSON, and all others similarly situated, | ] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |
| Plaintiffs-Appellees, | ] |
| v. | ] No. 73 C 635 |
| JESS MCDONALD, Director, Illinois Department of Children and Family Services, | ] |
| Defendant-Appellant. | ] John A. Nordberg, Judge. |

The following are before the court:

1. DEFENDANT'S EMERGENCY MOTION FOR RECONSIDERATION OF ORDER VACATING STAY OF INJUNCTION, WITH SUGGESTION FOR RECONSIDERATION EN BANC OF ORDER AND REHEARING EN BANC OF MERITS filed September 29, 1995 by counsel for appellant.

2. FOSTER CHILDREN'S MEMORANDUM IN OPPOSITION TO DCFS DIRECTOR'S (1) MOTION FOR RECONSIDERATION OF PANEL'S ORDER VACATING STAY; (2) SUGGESTION (MOTION) FOR EN BANC RECONSIDERATION OF PANEL'S ORDER VACATING STAY; AND (3) SUGGESTION FOR REHEARING EN BANC OF MERITS, AFTER MERITS

PANEL ASSIGNED TO THE CASE HAS HEARD ORAL ARGUMENT, BUT PRIOR TO ITS RULING ON THE MERITS filed October 3, 1995 by counsel for appellees.

IT IS ORDERED that the emergency motion for reconsideration of order vacating stay of injunction is GRANTED. After our order lifting the stay issued, DCFS informed us of its decision to extend the September 30, 1995 cut-off date to January 1, 1996. In light of that change in circumstances, we reinstate the stay entered by the motions panel on July 12, 1995, pending resolution of this appeal or further court order. The suggestion for rehearing en banc of the merits is DENIED.

# United States Court of Appeals

*For the Seventh Circuit*
*Chicago, Illinois 60604*

December 21, 1995

*Before*

Hon. HARLINGTON WOOD, Jr. *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

| | |
|---|---|
| MARCEL YOUAKIM, LINDA YOUAKIM, individually, and as foster parents, and TIMOTHY ROBERTSON, and all others similarly situated, MARCEL YOUAKIM, individually and as a foster parent,<br>Plaintiffs-Appellees, Cross-Appellants,<br>Nos. 95-2575 and 95-2813 v.<br>JESS MCDONALD, Director, Illinois Department of Children and Family Services,<br>Defendant-Appellant, Cross-Appellee,<br>and<br>ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br>Defendant-Appellee. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.<br><br>No. 73 C 635<br><br>John A. Nordberg, Judge. |

The following are before the court:

1. DEFENDANT-APPELLANT'S MOTION TO REINSTATE THE STAY OF INJUNCTION PENDING DISPOSITION OF PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC filed 12/15/95, by counsel for defendant Jess McDonald.

2. FOSTER CHILDREN'S MEMORANDUM IN OPPOSITION TO DFCS DIRECTOR'S MOTION TO REINSTATE THE STAY OF INJUNCTION PENDING DISPOSITION OF PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC filed 12/20/95, by counsel for the plaintiffs.

(over)

**IT IS ORDERED** that the motion is **GRANTED** in part and **DENIED** in part. The district court's June 30, 1995 order is **STAYED** insofar as it relates to children in unapproved relative homes pending resolution of the Director's Petition for Rehearing with Suggestion for Rehearing En Banc. All other relief requested in the Director's motion is **DENIED**.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **MARCEL YOUAKIM, et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | **73 C 635** |
| **v.** | ) | |
| | ) | |
| | ) | **Judge John A. Nordberg** |
| **JESS MCDONALD, etc. ,** | ) | |
| | ) | |
| **Defendant.** | ) | |

**INTERIM INJUNCTIVE ORDER**

This Court's Memorandum Opinion and Order dated June 30, 1995 (the "June 30 Order"), was affirmed as modified by the ruling in Youakim v. McDonald, 71 F.3d 1274 (7th Cir. 1995). In the June 30 Order, this Court determined that it was necessary to modify the August 24, 1976, Judgment and Order in this case (the "1976 Judgment"), and, pursuant to 28 U.S.C. § 2202, to afford the plaintiff foster children further injunctive relief. This interim order is being entered by this Court strictly for the purposes of implementing this Court's June 30 Order, as provided below.

Defendant's appeal to the court of appeals has now been resolved and all stay orders dissolved. The parties have met and agreed to the entry of this interim order, which is intended to provide the promptest possible provision of partial relief to the plaintiff foster children. This Court, after further submissions by the parties, intends to enter a Final Judgment Order that, when read with this interim order and any other interim orders that may be entered, will afford full relief to all of the plaintiff foster children entitled to it under the June 30 Order.

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

**DEFINITIONS**

1. For purposes of this order, the following terms shall have the meanings indicated:

(a) "Foster children" means children whose care and custody is the responsibility of the State of Illinois Department of Children and Family Services; "relative foster children" means such foster children who are placed with foster parents who are their relatives.

(b) "Relative foster parents" means the relative caretakers with whom relative foster children are or have been placed by DCFS.

(c) "Plaintiff" means: any relative foster child whose care and custody was or is the responsibility of DCFS, and who was living with relative foster parents as of June 30, 1995; and such a child's relative foster parents as of June 30, 1995. This definition is used solely to refer to the members of the class of persons who are to receive relief under this order, and it is not intended to limit or redefine the plaintiff class already certified in this action.

(d) "Child living in a preapproved (i.e., unlicensed and unapproved) home" means a plaintiff child who, as of June 30, 1995, was living in a home that had passed an initial safety check, but that DCFS had neither licensed as a foster family home nor approved as meeting the standards established for such licensing.

(e) "Child living in an approved home" means a plaintiff child who, as of June 30, 1995, was living in a home that DCFS had approved as meeting the licensing standards for foster family homes.

(f) "Defendant" means defendant Jess McDonald, Director of DCFS. In addition to defendant, the terms of this order shall bind defendant's successor(s) in office, including those with the responsibility for administering any successor agency performing the functions currently performed by DCFS, and defendant's and his successor(s)' employees, agents, and anyone else acting under his or their direction or in concert with him or them.

(g) "Full foster care payments" means the board payment amount provided by DCFS at the rate applicable to non-specialized licensed foster care under 89 Ill. Adm. Code § 359. Such

benefits are intended for the care of relative foster children only, even though received by the children's relative foster parents.

(h) "Out-of-Illinois relative foster children" means relative foster children who live in relative foster homes outside of Illinois.

(i) "State of residence" means the state, district, territory, or country of residence for out-of-Illinois relative foster children.

(j) "Final adverse determination of a licensing application" means the earlier of the date the relative foster parent withdraws the licensure application under DCFS Procedure 402, or the date of a notice to a relative foster home informing it that the licensure application is denied, provided, however, that the exercise of the right of the relative foster parent to maintenance of benefits pending an appeal filed within 10 days of the denial tolls the "final adverse determination" until an administrative appeal decision is issued.

(k) "Termination," when used in connection with full foster care payments, means to end payment of any foster care benefits on behalf of a relative foster child in a foster family, even though the foster child may continue to receive payments under the Aid to Families with Dependent Children ("AFDC") program, including AFDC supplements paid by DCFS.

**INTERIM INJUNCTIVE RELIEF**

2. Defendant is ordered to continue paying full foster care payments after January 1, 1996, on behalf of plaintiff children living in approved homes who: (a) continue to live in the same relative foster home as they lived in prior to July 1, 1995; (b) reside in Illinois; (c) live in homes that submitted a foster home conversion licensing application postmarked by July 1, 1995; and (d) live in homes whose licensing application the defendant has not yet finally determined.

3. Defendant is ordered to restore full foster care payments, effective January 1, 1996, to children living in

preapproved (i.e., unlicensed and unapproved) homes who: (a) continue to live in the same relative foster home as they lived in prior to July 1, 1995; (b) reside in Illinois; and (c) live in homes for which no licensing application has been filed prior to the date of this order, or, if a licensing application has been filed, defendant has not made a final determination of the application as of the date of this order. DCFS shall make all efforts within its control to ensure that the first payments made under this paragraph (those for January 1996) are mailed as close in time as possible to February 23, 1996. If such payments are not mailed by or on February 23, 1996, defendant's counsel shall inform plaintiffs' counsel in writing by 5:00 p.m. on February 26, 1996, of the reason such payments were not mailed and when DCFS expects the payments to be mailed.

4. Defendant is ordered to provide the following license application notice and procedures to the relative foster homes of plaintiff children whose full foster care payments are restored under paragraph 3 above, if the relative foster homes in which such children live have not applied for a license prior to the date of this order. If these relative foster homes do not comply with the deadlines set forth in the following application procedure, the defendant may, consistent with this paragraph and paragraph 7, terminate full foster care payments to the plaintiff children in such homes.

(a) Defendant shall mail a written notice (a copy of

which is attached hereto as Exhibit A) to all relative foster homes that care for plaintiff children whose benefits are restored under paragraph 3, and for which no licensing application has been filed as of the date of this order. This written notice (which shall be mailed no later than the same day as it is dated) shall include: (i) all forms necessary to complete an application for a foster home license, consistent with the definition of an application for a foster home license set forth in the Illinois Child Care Act of 1969, 225 ILCS 10/4, as amended by P.A. 89-21; (ii) all other materials and information specified in this order (including the Exhibit A notice) to be included with the mailing. Defendant shall maintain a 1-800 number for the purpose of receiving requests for application forms and instructions, and shall mail such forms and instructions to each person requesting them within one business day of the request.

(b) The plaintiff foster parents shall have 45 days from the date of the Exhibit A notice to mail the following documents to the DCFS Central Licensing Office in Springfield: (i) a completed Application for Foster Family Home License (Form CFS 597A); (ii) a completed Authorization for Background Check for all members of the home 18 years of age and older (Form CFS 597A-1), excepting the plaintiff child, (iii) a completed Foster Family Home Information sheet (Form CFS 506); and (iv) proof that every person age 18 and above living in the home, other than

plaintiff foster children, have been fingerprinted in accordance with the licensing application instructions. Subject to paragraph 9 below, proof of fingerprinting shall be a fingerprint receipt from a DCFS fingerprint provider.

(c) The plaintiff foster parents shall have 75 days from the date of mailing of the Exhibit A notice to: (i) complete six hours of foster parent training required for licensure; and (ii) mail to the DCFS Central Licensing Office a completed medical report as to the applicant foster parent(s). Defendant shall also include with the Exhibit A notice the appropriate medical form for the applicant to use. In lieu of submitting this medical form, the plaintiff foster parent(s) may submit any equivalent medical report (i.e., any medical report that provides at a minimum the same information required by the DCFS medical form), including medical reports previously submitted to DCFS, provided that a physician has completed the report within one year prior to the date of the Exhibit A notice.

5. Defendant is ordered to restore full foster care payments effective January 1, 1996, to plaintiff children who are out-of-Illinois relative foster children who: (a) continue to live in the same relative foster home as they lived in prior to July 1, 1995; and (b) live in homes for which no licensing or approval application with their state of residence has been filed prior to the date of this order, or, if such an application has been filed, the state of residence has not made a final

determination of the application as of the date of this order. DCFS shall make all efforts within its control to ensure that the first payments made under this paragraph (those for January 1996) are mailed as close in time as possible to February 23, 1996. If such payments are not mailed by or on February 23, 1996, defendant's counsel shall inform plaintiffs' counsel in writing by 5:00 p.m. on February 26, 1996, of the reason such payments were not mailed and when DCFS expects the payments to be mailed.

6. Defendant is ordered to provide the following license application notice and procedures to the plaintiff children whose full foster care payments are restored under paragraph 5 above, if, according to DCFS records, the relative foster homes in which such children live have not applied for a license or its equivalent with their state of residence prior to the date of this order. If the relative foster homes do not comply with the deadlines set forth in the following application procedure, the defendant may terminate full foster care payments to the plaintiff children in such home in accordance with the procedures set forth in paragraph 7 below:

(a) Defendant shall send a written notice (a copy of which is attached hereto as Exhibit B) via first class mail to the relative foster homes of plaintiff children whose full foster care payments are restored under paragraph 5 above, and whose relative foster homes have not, according to DCFS records, applied for a license or its equivalent prior to the date of this

order. The notice shall be mailed no later than the same day as it is dated and shall inform such relative foster homes that, if they have not already done so, they will have 45 days from the date of the notice to submit an application for a license or its equivalent in their state of residence. The notice will also inform the plaintiff foster parent(s) in the home that they must, within the same 45 days mail to defendant documentation from any official representative of the state of residence confirming that the caregiver has applied for licensure or its equivalent. Defendant shall send with the notice a form (substantially similar to Form ORC-2), which the plaintiff foster parent may use to obtain the signature of such an official, and this form, executed by the official, shall constitute adequate documentation. Documentation may also consist of a receipt issued in the state-of-residence, or a copy of the application marked "filed", or a written statement, letter or other document from a licensing worker or other appropriate official in the state of residence indicating that an application has been submitted.

(b) The plaintiff foster parents of out-of-Illinois relative foster children shall be responsible for providing defendant a copy of their license or equivalent document if their application is approved in the state of residence. If the application is denied, the plaintiff foster parents must promptly inform defendant of the denial. Defendant may terminate the full

foster care benefits paid to out-of-Illinois relative foster children only after a final adverse determination of their foster parents' applications for a license or equivalent by the state of residence. Nothing in this order bars defendant from communicating as it sees fit with the licensing agency in the state of residence respecting the process for determination of applications, or the progress in determining a particular application.

7. Subject to the other requirements of this order, including but not limited to the ones in this paragraph and paragraph 10 below, defendant may terminate full foster care payments to: (i) a plaintiff child described in paragraph 3 above who lives in a home for which no licensing application has been filed prior to the date of this order, if the child's plaintiff foster parent(s) fail to mail a complete application to DCFS postmarked on or prior to the 45th calendar day following the date of the mailing of the Exhibit A notice, or if the plaintiff child's foster parent(s) fail to complete the training and medical form requirement on or prior to the 75th day following the date of the mailing of the notice; and (ii) an out-of-Illinois relative foster child whose foster home is sent the written notice required under paragraph 6(a) above, if the plaintiff child's foster parent(s) fail to inform DCFS, in accordance with the requirements of paragraph 6(a) above, that they have filed a license or equivalent application with the

state of residence.

(a) Defendant is ordered to provide notice and the opportunity for an appeal to plaintiffs under 89 Ill. Adm. Code § 338 when defendant decides to terminate the full foster care payments of plaintiff children for failure of their plaintiff foster parents to meet any deadline set forth in this order. Plaintiff foster parents will have 30 days from the date of the notice within which to file an appeal. The parties do not intend this order to create any independent federal cause of action under which to enforce any of the provisions of 89 Ill. Adm. Code § 338, provided, however, that plaintiffs may enforce in this case their rights to notice and the opportunity for an appeal as provided in this order.

(b) The notice under paragraph 7(a) (a copy of which is attached hereto as Exhibit C) shall state which requirement(s) defendant has determined that a plaintiff foster parent has not met, including which forms, if any, the plaintiff foster parent has not submitted in a timely or complete manner. It shall also provide information about the right to appeal, including the right to continued full foster care payments upon filing an appeal within 10 days of the date of denial, subject to overpayment procedures if the appeal determination is adverse to the appellant. If a plaintiff foster parent prevails on appeal, full foster care payments for the plaintiff children in the parent's care shall be reinstated effective on the date on which

those payments were terminated pursuant to the decision under appeal.

8. Defendant may terminate full foster care payments paid pursuant to paragraphs 2 and 3 above for plaintiffs who submitted a foster home licensure application prior to the date of this order, and who either: live in homes that have filed a complete application for a foster home license on which a final adverse determination has been made; or live in homes in which members have failed to complete a specific licensing requirement, such as training, fingerprinting, or submission of medical forms, within required deadlines, subject to timely notice of the plaintiff's right to appeal and to secure continued payments pending appeal.

9. Plaintiff foster parents must submit proof that all members of the home 18 years of age and older who are not plaintiff children have been fingerprinted in accordance with the licensing application instructions. Such proof shall consist of a receipt from the fingerprint provider. DCFS shall cause to be made available a replacement receipt for plaintiff foster parents who lose the original receipt, and who request a replacement from the provider as explained in the Exhibit A notice. If, in an appeal under 89 Ill. Adm. Code § 338, a plaintiff foster parent contends that (s)he and all members of the home 18 years of age and older were fingerprinted in accordance with licensing application instructions but nonetheless does not have the required fingerprint receipt, DCFS shall attempt to verify that

contention by means of a list provided by its fingerprinting providers of all persons the provider has fingerprinted, and the date of fingerprinting. If the providers' list does not indicate that the member of the home claiming to have been fingerprinted was fingerprinted, that member shall be deemed not to have been fingerprinted. If the providers' list indicates that the member of the home claiming to have been fingerprinted was fingerprinted, that member shall be deemed to have been fingerprinted.

10. If any notice and forms sent to plaintiff foster parents under either paragraph 4 or paragraph 6 above are returned to DCFS (by the U.S. Post Office) as undelivered, DCFS shall attempt to redeliver those returned notices and forms. The notices DCFS attempts to redeliver shall be redated, and plaintiffs to whom DCFS attempts to redeliver such notices shall be afforded the full 45-day and 75-day deadlines provided for under paragraphs 4(b) and (c) and paragraph 6(a) above. Except as authorized by further order of this Court, defendant, after compliance with the notice and appeal requirements of this order, may terminate full foster care benefits to those homes to which DCFS attempts to redeliver notices and forms only if: (i) notices and forms DCFS attempts to redeliver by remailing are not returned as undelivered to DCFS; (ii) the foster parent's receipt of the notices and forms DCFS attempts to redeliver by means other than remailing is evidenced by a signed writing, and the

foster parent thereafter does not comply with the applicable deadlines provided for in this order; (iii) plaintiff children are not cared for in such homes; or (iv) counsel for plaintiffs agrees that DCFS has a reasonable basis for concluding that the children in such homes are no longer eligible for such benefits, provided that counsel for plaintiffs will not unreasonably withhold their stipulated agreement. If notices and forms DCFS attempts to redeliver by remailing are returned a second time as undelivered, defendant shall notify plaintiffs' counsel in writing that they have been returned. Plaintiffs' counsel and defendant's counsel shall then confer within a reasonably short time thereafter for the purpose of reaching agreement as to the appropriate means of resolving the fact that the notices and forms sent to certain plaintiffs were returned as undelivered.

ADDITIONAL PROVISIONS

11. This Court may also issue other relief orders to secure for the foster children the relief to which they are entitled. The failure to afford particular relief in this order is not to be construed as an adjudication that plaintiffs will not be entitled to such relief or other relief as part of a future order (including a Final Judgment Order) and is not meant to prejudice plaintiffs' right to seek relief in addition to that provided for in this order, or defendant's right to object.

12. Nothing in this order is to be construed to limit the implementation of the HMR Reform with respect to children placed

by DCFS with relative foster parents on or after July 1, 1995.

13. This Court shall retain continuing jurisdiction over this case, including enforcement of this order.

ENTER: John A. Nordberg
JOHN A. NORDBERG
UNITED STATES DISTRICT JUDGE

DATE: February 16, 1996

Date:_____ 

# IMPORTANT NOTICE ABOUT FOSTER CARE PAYMENTS

**The Illinois Department of Children and Family Services ("DCFS") is restoring full foster care payments for your relative foster child(ren). To keep full foster care payments coming, you must apply for a license by the deadlines described below.**

Dear Relative Caregiver:

Your foster care payments were reduced to the "standard of need" rate last August under a new state law. Relative caregivers like you challenged this state law in federal court. The court found that cutting your relative foster child(ren's) benefits without giving you a fair chance to get a foster home license was illegal. And the court has now ordered DCFS to raise your payments back to the full foster care rate while you are given a fair chance to get a license.

Specifically, the federal court ordered DCFS to restore full foster care payments to you, beginning with the check you receive in February 1996 (for care you provided in January 1996).

This notice informs you of how your relative foster children can qualify for full foster care payments. To qualify, your home must be licensed.

Our records show that:

- You care for a related child who was placed with you by DCFS before July 1, 1995;
- Your home is not currently licensed as a foster family home; and
- DCFS has not received a licensing application from you.

The first step in getting a license is to apply for one. This notice explains how to do that, and about the time deadlines for applying.

(Insert in Spanish)

This is an important letter about restoration of full foster care payments you receive for DCFS children in your home and about the opportunity you have to keep those payments coming by applying for a foster home license within certain time deadlines. If you cannot understand this letter, or if you do not have someone who can explain it to you, please call 1-800-232-3798 for help.

Exhibit A

The full foster care payments that the court has ordered will continue if you send in a timely license application as explained below. You do not need to apply for a foster home license or be trained or fingerprinted in order to keep the DCFS child in your home. However, your payments will be cut again if:

- You do not mail the enclosed foster home license applications and licensing materials by _____ (see the "Application" section, below); or
- You do not complete the required training or submit the required medical forms by _____ (see the "Training" and "Medical Forms" sections, below); or
- Your licensing application is denied (subject to your right to appeal) or withdrawn.

## APPLICATION PROCESS

1. **Forms:** To file an application for a license and to continue to receive full foster care payments you must fully complete the following three forms, and mail those forms and the described fingerprint receipts to the address below:

   - an *"Application for Foster Family Home License"* (Form CFS 597A). If you live with your spouse, both of you must be applicants;
   - an *"Authorization for Background Check"* Form CFS 497A-1) for yourself and every person 18 years of age or older living in your home (other than the foster child);
   - a *"Foster Family Home Information"* sheet (Form CFS 506); and
   - *Fingerprint receipts* for every person age 18 and above living in your home (other than the foster child). Receipts are given out at the fingerprint facility. (See the "Getting Fingerprinted" section, below.) SAVE YOUR FINGERPRINT RECEIPTS.

   The licensing application forms are included with this notice.

2. **Mailing: Where To Send The Licensing Application Forms:** After completing the above forms, place them in an envelope and mail them *directly* to DCFS at the following address:

   **DCFS**
   **Central Office of Licensing--FIN**
   **Mail Station 60**
   **406 East Monroe Street**
   **Springfield, Illinois 62701**

3. **Deadline For Submitting Licensing Application Forms** Your new application forms must be mailed and postmarked no later than _____, or your payments will be dropped to the lower "standard of need" rate.

## GETTING FINGERPRINTED

The new state law requires that anyone who applies for a foster home license, and every person age 18 and over who lives in the applicant's home, must be fingerprinted at one of the State's authorized fingerprinting locations. Once a person's fingerprints are taken, the fingerprint operator will give him/her a receipt. KEEP THE RECEIPT. You must include your fingerprint receipt for you and every person age 18 and over living in your home in the application materials you send to DCFS by _____.

To get fingerprinted, you and every person age 18 and above living in your home must schedule a fingerprinting appointment by calling the fingerprint operator directly at 1-800-377-2080. The State has made arrangements with the fingerprint operator to provide enough slots for everyone to be fingerprinted, but it is important that you call the 800 number immediately to schedule an appointment so that all fingerprinting is completed before the _____ deadline. The fingerprint sites are open Monday through Friday, 8:00 a.m.-5:00 p.m.

If you or anyone else in your family who has been fingerprinted loses his/her fingerprint receipt, you or s/he can get a duplicate receipt mailed to you by phoning the fingerprint operator at the 800 number above. Please hold on to your original receipt and only phone for a duplicate receipt as a last resort.

## TRAINING

To continue receiving the full foster care payment while your licensing application is being processed by DCFS, and to qualify for a foster home license, you must complete 6 hours of foster parent training by _____. You must apply with your spouse if you live together, and then *both* of you must attend the required training.

To help you meet the training requirement, DCFS has scheduled foster parent training sessions throughout the state. A list of training registration locations provided by DCFS is enclosed with this notice. The list includes the names and phone numbers of contact person(s) for each location. To find out when training sessions will be held and to register for DCFS training, call the contact person listed for the site nearest you.

If a private agency is handling your foster child's case, training that is available from your private agency may satisfy the training requirement if it has been approved by DCFS. To find out if your agency's training has been approved and/or if your private agency has training sessions scheduled, contact your private agency caseworker. Even if you are working with a private agency, the DCFS training sessions are open to you, so plan to attend the training session that is most convenient for you and that will help you meet the training deadline.

If you are absolutely unable to attend any of the scheduled training sessions because of a disability or because your work schedule prevents you from attending the sessions, you *may* be eligible to meet the training requirement in your home with a self-study packet. Request a self-

study packet by enclosing a written request for it with your license application materials.

## MEDICAL FORMS

To continue receiving the full foster care payment while your licensing application is being processed by DCFS, and to qualify for a foster home license, you must submit completed medical reports for you (and your spouse, if your spouse is applying) to the DCFS address in Springfield set forth on page 2 above. Your forms must be sent and postmarked by _____.

Appropriate medical forms are included with this notice. However, you may submit equivalent medical forms (forms that provide, at a minimum, the same information as required by the DCFS medical forms) if a physician completed them within one year prior to the date of this notice.

## COOPERATION WITH THE REST OF THE LICENSING PROCESS

After you submit your license application, complete training, and submit your medical forms, a licensing worker from DCFS or your private agency will visit you to determine whether your home meets licensing standards.

You may also have to send DCFS additional materials, depending on the particular conditions of your home. Your licensing worker will inform you of any additional materials you must submit.

Failure to cooperate with the licensing worker could lead to your application being denied and your payments being reduced, but you will have the right to appeal such a decision.

## WHAT HAPPENS IF YOU MISS A DEADLINE

1. Application Materials Deadline: _____

   If your licensing application materials are not mailed to DCFS in Springfield and postmarked on or before _____, your payments will be cut to the "standard of need" rate. The payment will be increased to the higher full foster care payment rate only after you later apply for a license and actually become licensed.

2. Training and Medical Forms Deadline: _____

   If you have not completed training by _____, *or* if your medical forms were not mailed to Springfield with a postmark on or before _____, your payments will be lowered to the "standard of need" rate. The payments will be increased to the higher full foster care payment rate only after you later apply for a license and actually become licensed.

## DCFS LICENSING DECISION

If DCFS issues you a license, you will continue to receive foster care payments at the full foster

care rate.

If your application for a license is denied, you will receive a written notice explaining the reason(s) for the denial. You may be able to continue to care for children placed in your home, but your payments will be cut to the "standard of need" rate.

If you disagree with the reason(s) for denial of your application, you may appeal the denial. If you appeal within 10 days after the date of denial, full payments will continue, if you choose, while the appeal is pending. The notice you will receive if you are denied a license will tell you more about your appeal rights, including the right to continued full payments pending appeal.

At a later time, if the reason your application for license was denied has been corrected, you may apply for a license again. You will be paid at the lower "standard of need' rate until your application is granted and you receive a license.

## WHERE TO GET MORE INFORMATION OR HELP

If you need help with this application (including help with mailing the application) or more information about the application process, please contact your caseworker. If you need more copies of the licensing application or medical forms, please call the Ombuds' Office at 1-800-232-3798.

If your foster child's case is with a private agency and you do not know how to contact your caseworker, look at the list of all private agencies that has been included with this notice. For each agency listed, there is a contact person and his/her phone number. The contact persons will be able to answer your questions and give you the name and phone number of your caseworker, or your worker's supervisor.

If your foster child's case is with DCFS and you do not know how to contact your caseworker, look at the list of DCFS contacts that has been included with this notice. Each contact person is listed by office location. He/she will be able to answer your questions or give you the name and phone number of your caseworker, or your worker's supervisor.

If you have other questions, or if you cannot reach your caseworker or a contact person, you can call the DCFS Ombuds' Office at 1-800-232-3798. For the next 45 days, the Ombuds' Office will be open from 8:30 a.m. to 8:00 p.m., Monday through Friday.

## MAKE SURE YOU MEET THE DEADLINES. DON'T WAIT FOR A PHONE CALL TO SEND IN YOUR FORMS.

SAVE THIS NOTICE in case questions about your license application or foster care payments come up later.

Date:_____

## IMPORTANT NOTICE ABOUT FOSTER CARE PAYMENTS

**The Illinois Department of Children and Family Services ("DCFS") is restoring full foster care payments for your relative foster child(ren). To keep full foster care payments coming, you must apply for a license as described below.**

Dear Relative Caregiver:

Your foster care payments were reduced to the "standard of need" rate last August under a new state law. Relative caregivers challenged this state law in federal court. The court found that cutting your relative foster child(ren's) benefits without giving you a fair chance to get a foster home license was illegal. And the court has now ordered DCFS to raise your payments back to the full foster care rate while you are given a fair chance to get a license.

Specifically, the federal court ordered DCFS to restore full foster care payments to you, beginning with the check you receive in February 1996 (for care you provided in January 1996).

This notice informs you of how your relative foster children can continue to receive full foster care payments. To qualify for such payments, your foster home must be licensed in your home state. Some states may call this an "approval" or "certification" instead of a license.

Our records show that:

- You care for a related child who was placed with you by DCFS before July 1, 1995;
- Your home is not currently licensed as a foster family home; and
- DCFS has not received a certification from you that you have filed a foster home license application (or its equivalent) in your home state.

The first step in getting a license is to apply for one. This notice explains how to do that, and about the time deadlines for applying.

(Insert in Spanish)

This is an important letter about the restoration of full foster care payments you receive for DCFS children in your home and about the opportunity you have to keep those payments coming by applying for a foster home license within 45 days. If you cannot understand this letter, or if you do not have someone who can explain it to you, please call 1-800-232-3798 for help.

The full foster care payments that the court has ordered will continue if you send in a timely *Certification of License Application* (Form ORC-2), as explained below. However, your payments will be cut again if:

- You do not apply for a foster home license (or its equivalent) in your home state and mail the enclosed *Certification of License Application* (Form ORC-2) by _____ (see the "Application" section, below); or

- Your licensing application is denied (subject to your right to appeal) or withdrawn.

A foster home license or submission of the *Certification of License Application* is not necessary for you to keep the DCFS child(ren) in your home. But your payments will be cut if you do not apply for a license and submit the *Certification of License Application* in a timely manner.

## IF YOU ARE ALREADY LICENSED

If you are already licensed (or "approved" or "certified"), please complete the enclosed *Verification of License Determination* (Form ORC-1) and send it and a copy of your license or other equivalent official certification to:

Interstate Compact Office
DCFS, Station 55
406 E. Monroe
Springfield, IL 62701-1498

If you submit the *Verification of License Determination* and a copy of your license, you can skip the rest of this notice, since it does not affect you.

## IF YOU HAVE ALREADY APPLIED FOR A LICENSE

If you have already applied for a foster home license (or "approval" or "certification") in your home state, and your application has not been ruled on yet, you do not need to apply again. Simply have your caseworker or licensing worker complete and sign the enclosed *Certification of License Application* (Form ORC-1). Then you must mail the completed form to the Interstate Compact Office at the above address, postmarked by _____. If you meet this deadline, you will continue receiving full foster care payments unless your application is denied by your home state. Please note that your home state may deny your application if you do not cooperate with the rest of the licensing process (see "Cooperating with the Rest of the Licensing Process" section below).

## APPLICATION PROCESS

1. **Certification of License Application** To continue receiving full foster care payments, you must fully complete a licensing application or its equivalent in the state where you live--your "home state". The specific licensing requirements are different in each state. However, as a first step, you must complete an application for a foster home license (in your home state) by _____. When you have done this, have your licensing worker (or other caseworker, it you do not have a special licensing worker) complete the

enclosed *Certification of License Application* (Form ORC-2). You must mail this completed form (or send other documentation that you have filed an application for a license or its equivalent in your home state) to the DCFS Interstate Compact Office address listed on page 2 above. The completed form (or other documentation) must be mailed and postmarked by _____.

2. **If You Have Any Questions** If you have any questions regarding the licensing process in your home state, please contact your caseworker in that state. If you are having difficulty in obtaining a license in your state or have any other questions, please contact the DCFS Interstate Compact Office at (217) 785-2680.

3. **Deadline For Submitting Licensing Application Forms** Your completed *Certification of Licensing Application* form must be mailed and postmarked no later than _____, or your payments will be dropped to the lower "standard of need" rate.

## COOPERATION WITH THE REST OF THE LICENSING PROCESS

In addition to submitting your licensing application, you must also cooperate with the rest of the licensing process in your home state. This may include training, fingerprinting, a medical examination and a visit by a licensing worker to determine whether your home meets licensing standards.

Failure to cooperate with the licensing worker could lead to your application being denied in your home state and your payments being reduced, but you will have the right to appeal such a decision.

## WHAT HAPPENS IF YOU MISS THE DEADLINE

If your *Certification of License Application* is not mailed to DCFS in Springfield and postmarked by _____, your payments will be cut to the "standard of need" rate. The payments will be increased to the higher full foster care payment rate only if you later apply for a license and become licensed.

## FINAL LICENSING DECISION

It is your responsibility to inform the DCFS Interstate Compact Office of your home state's final decision granting or denying your license application. For this purpose, a form (*Verification of License Determination*, Form ORC-1) is enclosed. Complete the form and mail it to the DCFS Interstate Compact Office promptly after your home state finally decides your license (or "approval" or "certification") application. The address for the Interstate Compact Office is on page 2 above.

If your home state issues you a foster home license (or "approval" or "certification"), and you mail a copy of it to the Interstate Compact Office, you will continue to receive full foster care payments. If your home state denies your application for a license, you may be able to continue caring for the foster children placed in your home, but your payments will be cut to the "standard of need" rate.

## WHERE TO GET MORE INFORMATION OR HELP

If you need more information or help with this application, please contact your caseworker in the state where you live. If you are having difficulty in obtaining a license in your state, or if you have any other questions, please contact the DCFS Interstate Compact Office at (217) 785-2680.

If you have other questions, or if you cannot reach your caseworker or the Interstate Compact Office, you can call the DCFS Ombuds' Office at 1-800-232-3798. For the next 45 days, the Ombuds' Office will be open from 8:30 a.m. to 8:00 p.m., Monday through Friday.

## MAKE SURE YOU MEET THE DEADLINES. DON'T WAIT FOR A PHONE CALL TO SEND IN YOUR FORMS.

SAVE THIS NOTICE in case questions about your license application or foster care payments come up later.

Date:_____

**IMPORTANT NOTICE ABOUT FOSTER CARE PAYMENT REDUCTION**

Dear Relative Caregiver:

Your foster care payments were increased in February. At the time of that increase, you received a letter from DCFS telling you about the increase and explaining the deadlines you had to meet to continue getting the higher payments. You did not meet all of those deadlines, so now your payments are being reduced to the "standard of need" rate that you were getting before February.

The marked boxes indicate which deadlines you missed:

☐ _____ DEADLINE
You did not mail the following material(s) to DCFS, postmarked by _____:

- ☐ completed application forms, including an *"Application for Foster Family Home License"* (Form CFS 597A), an *"Authorization for Background Check"* (Form CFS 497A-1) for yourself and <u>every adult</u> living in your home, and a *"Foster Family Home Information"* sheet (Form CFS 506);
- ☐ Fingerprint receipts for every adult living in your home.

☐ _____ DEADLINE
You did not complete the following step(s) by _____:

- ☐ complete the required six hours of foster parent training;
- ☐ mail the required medical forms to DCFS.

If you still want to get a foster home license, you may now submit a new application. See your licensing worker or caseworker to help you with the application. You may also appeal. See the following page for information about appealing.

APPEALS

If you feel that the boxes marked above are incorrect, and that you really did meet the marked deadlines, you can appeal this decision. If you appeal, your request for an appeal must be sent in writing to the address below and must describe when and how you met the deadline(s) marked above. Include any evidence you have to show that you met the deadline.

Your appeal request must be postmarked within 30 days of the date at the top of this notice. If you mail your request even sooner, and it is postmarked within ten days of the date at the top of this notice, DCFS will not reduce your payments until your appeal is fully processed.

NOTE: If you are appealing and the marked boxes above indicate that you missed the _____ deadline, GO AHEAD AND COMPLETE THE TRAINING AND MAIL THE MEDICAL FORM(S) BY _____. If you are appealing and the marked boxes above indicate that you missed the _____ deadline, you must continue to cooperate with the licensing process.

Send your request for an appeal to:

Bureau of Administrative Hearings
HMR Appeals
406 East Monroe, Station 225
Springfield, IL 62701

Minute Order Form (rev. 12/90)

**UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS**

| Name of Assigned Judge or Magistrate Judge | John A. Nordberg | Sitting Judge if Other Than Assigned Judge | |
|---|---|---|---|
| Case Number | 73 C 635 | Date | April 29, 1996 |
| Case Title | Youakim v. McDonald | | |

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "MOTION" box above]

(2) ☐ Brief in support of motion due _____

(3) ☐ Answer brief to motion due _____ Reply to answer brief due _____

(4) ☐ Ruling/Hearing on _____ set for _____ at _____

(5) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(6) ☐ Pretrial conf ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(7) ☐ Trial ☐ Set for ☐ re-set for _____ at _____

(8) ☐ Bench Trial ☐ Jury Trial ☐ Hearing held and continued to _____ at _____

(9) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2) ☐ General Rule 21 ☐ want of prosecution ☐ FRCP 41(a)(1) ☐ FRCP 41(b)

(10) [X] [Other docket entry] Plaintiff to submit final judgment order brief and proposed judgment order by May 6, 1996; defendant to reply May 30, 1996; ruling July 3, 1996 at 2:00 p.m.

(11) ☐ [For further detail see] ☐ order on the reverse of ☐ order attached to the original minute order form.

☐ No notices required, advised in open court.
☐ No notices required.
☐ Notices mailed by judge's staff.
☐ Notified counsel by telephone.
☐ Docketing to mail notices.
☐ Mail AO 450 form.
☐ Copy to judge/magistrate judge.

Number of notices
Date
Docketing deputy initials
Date mailed notice
Mailing deputy initials

Document #

courtroom deputy's initials

Date/time received in central Clerk's Office

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| MARCEL YOUAKIM, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | No. 73 C 635 |
| | ) | |
| v. | ) | Judge John A. Nordberg |
| | ) | |
| JESS MCDONALD, Director, Illinois Department of Children and Family Services, | ) | |
| | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

**AFFIDAVIT OF MARY SUE MORSCH**

| | | |
|---|---|---|
| COUNTY OF COOK | ) | |
| | : | ss: |
| STATE OF ILLINOIS | ) | |

MARY SUE MORSCH, being duly sworn, deposes and states as follows:

1. I am the Chief of the Office of Litigation Management for the Illinois Department of Children and Family Services, and I am co-chairing the implementation process for the Department's Home of Relative ("HMR") Reform. I submit this affidavit to provide the Court with relevant information regarding the Department's progress in implementing the HMR Reform, as well as to address some of the consequences of providing the relief recently requested

by plaintiffs. I previously submitted testimony to this Court, on June 14, 1995, concerning the Department's HMR Reform efforts.

Licensing of Relatives

2. Since the announcement of the HMR Reform, over 8,500 relatives have applied for a foster home license. This includes applications submitted through February 1996. As of March 12, 1995, almost 3,900 of these applications have resulted in an issued license, over 1,400 have been denied, almost 400 have been withdrawn, and over 2,800 are still pending. Of the 3,900 homes that have been issued a license, 1,600 were previously unapproved homes that experienced a rate reduction between July and December of 1995. This has occurred while the Department continues its efforts to implement the HMR Reform, as well as the notice and payments required by the February 16, 1996 Interim Injunctive Order.

Mary Sue Morsch

SWORN TO BEFORE ME THIS
18th day of March, 1996

Notary Public

"OFFICIAL SEAL"
SANDRA K BLANCH
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 12/22/99

**DATE:** May 3. 1996

**TO:** Home of Relative Provider Agencies/DCFS Staff
Home of Relative Implementation Workgroup
Interested Associations and Advocates

**FROM:** Carolyn Cochran Kopel and Mary Sue Morsch

**SUBJECT:** **WEEKLY UPDATE ON HOME OF RELATIVE REFORM INFORMATION**

**YOUAKIM V. MCDONALD:** Of the relative caregivers who were sent the initial "lavender" application packets on February 23rd, 727 were in full compliance will the April 8th deadline; 136 submitted incomplete materials; 53 submitted materials but failed to do so on time; and 1,697 did not respond at all. On April 26th, all of those who did not attain full compliance by the April 8th deadline were sent a notice informing them that their payment will be reduced effective April 1, 1996. The reduction will be reflected in the first board run in May.

The caregivers who did comply must meet the May 8th deadline of submitting their medicals and completing the training. Non-compliance will result in their payment being reduced effective May 1, 1996 with the first board run in June.

**DEFLECTIONS FROM CARE: CHANGE IN DEFINITION OF NEGLECT/DEPENDENCY:** As of May 2nd, 1,435 calls were received by the State Central Registry regarding children currently residing with relatives. Of these, 719 were referred for extended family support services, 70 were referred for investigation, 34 had pending investigations, 83 were open cases and were sent to the follow-up worker, 47 were referred elsewhere/no action and 478 had informational packets sent to their home. Of those who received informational packets, 26 relatives called the hotline a second time requesting additional services.

**LICENSING:** As of April 29th, 3,559 relative homes who submitted conversion applications have been licensed, 44 have surrendered licenses, 423 have withdrawn their license application and 1,278 have been denied licenses. Agencies and DCFS workers will soon be receiving a list of 1,612 relatives who remain pending and asked to dispose of these applications.

**PAYMENTS:** Please assist the relative caregiver in completing the "relationship" column on the 1401 for submission to DPA. The HPU has been sending mass 1401's to caregivers with children placed after July 1, 1995 who have not gone to DPA and applied for AFDC. The instructions accompanying the 1401 explain the space marked "Relationship" must be completed before going to the local DPA office. The form is not being completed as instructed and as a result, DPA is rejecting the 1401, asking the caregiver to prove relationship or calling the HPU for the relationship. The HPU does not have this information. Each caseworker receives a copy of the letter informing the relative they need to apply for AFDC. The worker should immediately assist the caregiver with the completion of the 1401 when they receive a copy of the letter.

**DATE:** March 29, 1996

**TO:** Home of Relative Provider Agencies/DCFS Staff
Home of Relative Implementation Workshop
Interested Associations and Advocates

**FROM:** Carolyn Cochran Kopel and Mary Sue Morsch

**SUBJECT:** **WEEKLY UPDATE ON HOME OF RELATIVE REFORM INFORMATION**

**YOUAKIM V. MCDONALD:** To date, 190 relatives have submitted licensing materials pursuant to the notice sent to Youakim class members with no prior licensing activity. The deadline for submitting these forms, April 8, 1996, is approaching. If the relative caregivers on your caseload have not submitted these materials, please discuss with them their intentions to do so and assist them in meeting the deadline, as well as explain the consequences of not applying at this time. If they choose to apply, please assist them in meeting the April 8 deadline.

**DEFLECTIONS FROM CARE: CHANGE IN DEFINITION OF NEGLECT/DEPENDENCY:** As of March 29, 1281 calls were received by the hotline regarding children currently residing with relatives. Of these, 680 were referred for extended family support services, 67 were referred for investigation, 79 were open cases and referred to the worker, 34 had pending child protection investigations, 44 were referred elsewhere/no action and 373 had informational packets sent to their home. Of those receiving informational packets, 20 called the hotline a second time requesting casework services.

Beginning April 1, a new referral form will be used by the State Central Registry. It will include the relative's telephone number and a question about the caregiver's desire to complete tasks on his/her own with only the assistance of the informational packet. These changes are expected to cut down on the number of caregivers who receive an additional packet who would be better served by the program.

**TRAINING:** Please remind relative caregivers that when they go to training they should bring their DCFS provider identification number with them. This number can be found at the top of the monthly payment statement they receive from DCFS and will help DCFS match trained relatives to the DCFS computer system.

**LICENSING:** As of March 25, 3406 relatives submitting conversion applications have been issued licenses, 378 have withdrawn their licensing applications, 3 have surrendered their licenses and 1361 have been denied licenses. 1770 conversion applications remain pending; agencies, DCFS licensing staff and relatives are instructed to complete the remaining activities and submit a licensing recommendation.

**PAYMENT:** Caregivers on AFDC must cooperate with DPA in the child support enforcement interviews and the redetermination process. Non-cooperation could result in the cancellation of their AFDC grant.

DCFS workers must assist the caregivers in seeking social security numbers for the DCFS wards when they are applying for AFDC. The DCFS wards will be canceled from the AFDC grant if a SSN is not verified. Workers should provide any documentation contained in files to relative caregivers to support this process.

**HUMAN SERVICE CONSOLIDATION:** This afternoon, Governor Edgar filed Executive Order No. 3 which provides for a phase-in consolidation of human services agencies. Highlights of the order are being sent to you early next week.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
333 WEST WACKER DRIVE
CHICAGO, ILLINOIS 60606-1285
(312) 407-0700

FAX: (312) 407-0411
DIRECT DIAL
(312) 407-

BOSTON
HOUSTON
LOS ANGELES
NEWARK
NEW YORK
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON

BEIJING
BRUSSELS
FRANKFURT
HANOI
HONG KONG
LONDON
MOSCOW
PARIS
PRAGUE
SINGAPORE
SYDNEY
TOKYO
TORONTO

April 30, 1996

By Facsimile and First Class Mail

Diane L. Redleaf, Esq.
Lehrer & Redleaf
205 West Monroe Street
Chicago, Illinois 60606

Re: Youakim v. McDonald, No. 73 C 635
(N.D. Ill.) (Nordberg, J.)

Dear Diane:

Following is the data on payment raises made and application packets sent pursuant to Judge Nordberg's February 16, 1996 Interim Injunctive Order. The Department increased 9,001 children in approximately 4,500 unlicensed relative homes from standard of need payments to the foster care board rate as of January 1, 1996 (with the payments mailed in February, 1996). The Department mailed the licensing application packet under Paragraph 4 of the Interim Injunctive Order to 2,643 relative homes.

Please call with any questions you may have regarding this data.

Very truly yours,

Daniel M. Feeney

DEPARTMENT OF CHILDREN AND FAMILY SERVICES
Division of Child Welfare

RELATIVE
~~FOSTER~~ HOME PLACEMENT AGREEMENT

Date of Placement 1/7/72

The Division of Child Welfare, Department of Children and Family Services, has approved the home of Mr. and Mrs. Marcel Youakim,
address 1720 E. Mannheim Rd., Des Plaines, Ill.
for the care of a foster child: Name Timothy Robertson Born 5/1/65

~~A monthly rate which is inclusive and has three component parts - board and clothing and personal allowance for this child. [illegible] a child specific basis.~~

~~[illegible]~~

The district worker will visit the ~~foster~~ above home in order to:

Know the child and keep informed regarding his adjustment.

Assist the ~~foster~~ family and the child in problems that may arise.

Discuss information regarding the child's family and background in order to assist the ~~foster~~ family in understanding and helping the child.

Plan for meeting the clothing, medical care, and other needs of the child.

Discuss any changes in planning for the child.

The Department has the right and authority to remove the child when it appears that this is in his best interests, and agrees to give at least two weeks notice prior to removal if at all possible. However, in those instances in which the Department receives substantiated evidence that the child is receiving improper care or treatment, the Department will remove the child immediately pending investigation. The ~~foster~~ parents agree to cooperate with the Department and to:

Share with the worker their experiences with the child.

Comply with requirements for regular medical and dental examinations.

Report to the worker any illness of the child and any need for medical care.

Call a physician immediately and notify the district office as soon as possible in case of acute illness or accident.

Discuss any change in plans for the child with the worker.

Plan clothing and other needs with the worker.

Consult the worker regarding any extended trip being planned for the child. When the trip is out-of-state, consent from the district office is necessary.

Cooperate with the worker regarding visits between the child and his family either in the ~~foster~~ home, office, or elsewhere; treat the parents courteously, and refrain from criticizing them in the child's presence.

Plan with the worker before making religious commitments for the child, such as baptism, confirmation, and church membership.

Keep confidential all information regarding the child and his family.

Make no arrangements for boarding other children without approval of the worker.

Report any changes in the ~~foster~~ family's situation, or circumstances, which may affect the welfare of the child or the ~~foster~~ family's ability to continue giving care. Give the worker at least two weeks notice, in any situation, when requesting that the child be removed. More than two weeks is often needed to complete planning for the child.

It is understood by both the worker and the ~~foster~~ parents that the child is not placed for adoption in this ~~foster~~ home, and that the child may be removed by the Department when it appears to be for the child's best interests.

This placement agreement, made in good faith and mutual confidence, is equally binding on the Department and the ~~foster parents~~ ABOVE NAMED RELATIVES.

(District office stamp)

David Youakim 1/7/72
(~~Foster parent~~) M. Youakim (Date)
brother-in-law

(~~Foster parent~~) 1-7-72
(Date)
Sister- Linda Youakim

(Department Representative) 1/7/72 (Date)

EXHIBIT I (two of two pages)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| MARCEL YOUAKIM, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | No. 73 C 635 |
| | ) | |
| v. | ) | Judge John A. Nordberg |
| | ) | |
| JESS MCDONALD, Director, Illinois Department of Children and Family Services, | ) | |
| | ) | |
| Defendant. | ) | |

DEFENDANT'S RESPONSES TO PLAINTIFFS'
FIRST AND SECOND SETS OF INTERROGATORIES

INTERROGATORY NO. 4(a).

As to the period prior to implementation of the HMR Plan, explain fully the process, and identify any documents that describe or relate to or were utilized in the process, for initiating or filing an application for approval or licensing of a relative foster family home, and for deciding on such application. The explanation should include a description of what specific actions particular DCFS staff were required to or did ordinarily take, including the completion of specified forms, to effect the filing and processing and deciding of such applications, and what actions relative foster parents or caregivers were required to or did ordinarily take.

RESPONSE TO INTERROGATORY NO. 4(a).

*Relative Approval Process*

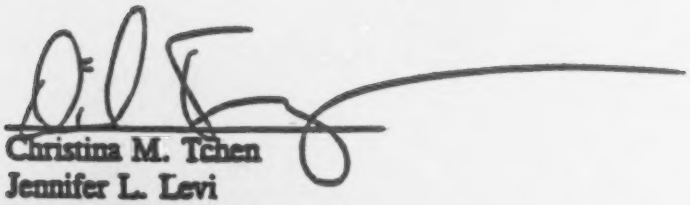
The following is a description of the relative approval process in place prior to the HMR reform. It includes a discussion of cases that were handled by private agencies as well. Note, however, that 67 different private agencies did approval work for DCFS, and each agency has its own internal

procedures for carrying out the work required under their contract with DCFS (program plan explaining responsibilities for full services private agencies [case-work services plus approval status] is attached as Exhibit A [Bates No. Y-000474 - Y-000494]; program plan for agencies providing approval only is attached as Exhibit B [Bates No. Y-000496 - Y-000503]). To the extent this interrogatory requests information regarding the private agencies' specific procedures, defendant objects on the grounds that such request is overboard and overly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence at the hearing. Note also that in practice, procedural variations developed among the DCFS regions as noted below.

Upon placing a child with a relative, or when a child living with a relative entered DCFS custody, the placing worker was required to provide the relative with a copy of the Reid brochure (Bates No. Y-000429 - Y-000435) (copy attached as Exhibit C) and to have the relative sign copies of the Relative Home Placement Agreement (CFS-458) (Bates No. Y-000425 - Y-000426) (copy attached as Exhibit D). In addition, the placing worker began working on the Notice of Relative Home Placement (CFS-454) (Bates No. Y-000427 - Y-000428) (copy attached as Exhibit E), which checked the home against the pre-placement conditions of Rule 335 (Bates No. Y-000504 - Y-000525) (copy attached as Exhibit F). Completion and transmission of the CFS-454 is described in DCFS

Procedure 335, Appendix A (Bates No. Y-005000 - Y-005019) (copy attached as Exhibit G).

Dated: Chicago, Illinois
June 11, 1995



Christina M. Tchen
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4/91

State of Illinois
Department of Children and Family Services

## RELATIVE CARETAKER PLACEMENT AGREEMENT

Child's Name(s) _____

Child's Case Number(s) _____

This is an agreement between the relative caretaker and the Department of Children and Family Services. The relative's signature at the end of this agreement indicates that the service worker has discussed the conditions below and that the relative understands and shall adhere to each condition during the time the related child remains in the home.

1. The relative will provide a loving, nurturing, and safe home environment. The relative will take the child to all ordinary medical/dental appointments and enroll the child in school when of school age.

2. The relative will participate in a social assessment with the DCFS worker/designee which shall include, but is not limited to:
   - background history of relative
   - inter-personal relationships between natural parents and relatives
   - current functioning of relatives
   - relative's ability to parent
   - relative's ability to provide for child's basic nutritional, social and health needs
   - thorough background check
   - assessment of household composition
   - description of home, including the sleeping arrangements

3. The relative understands that Department approval is required before certain actions may be taken. Without Department knowledge and approval, the relative:
   - shall not return the child to the natural parents
   - shall not allow the natural parents to reside in the relative's home
   - shall not move the child to another home or give the child to another relative or caretaker
   - shall not arrange or consent to medical, psychological, or psychiatric testing or treatment
   - shall not discuss confidential information about the child or natural parents with an unauthorized person
   - shall not take the child out of state

4. The relative understands that the placement of the child may be temporary, that the Department will assess the natural parents' ability to provide support, nurturance, and supervision of their child, and that the Department will make every effort to reunite the family or if that is not possible, to secure a permanent legal family for the child. The Department retains the right to change the child's placement. The relatives have the right to request a reconsideration of the Department's decision to change the child's placement.

5. The relative understands that the Department will work with the parents to establish a service plan for the child and that this plan will be reviewed every six months. Relatives are encouraged to participate in these case reviews every six months or as they are scheduled.

6. The relative understands that the Department may approve and its worker or designee may arrange and/or supervise visits between the natural parents and the child. The DCFS worker will notify the relative of the frequency, dates and location of visits and will notify the relative when visits must be supervised.

7. The relative will advise DCFS worker/designee of any unusual behavior, special needs, or issues which are influencing or affecting the child's behavior and development. DCFS worker/designee will work with the relative to seek a solution to the problemmatic behavior.

8. The relative will advise DCFS worker/designee immediately of any unusual behavior of the parents which could have an adverse effect on the child.

9. The relative agrees to notify the DCFS worker if any one moves in or out of the home, if the relative moves to a different address, or if the relative gets a job or loses a job.

— over —

10. The relative understands that physical punishment may not be used as a disciplinary measure.

11. The relative agrees to cooperate with the licensing process and understands that the home must meet licensing standards or be approved as a relative home in order for the child to remain.

12. The relative understands that a worker will be assigned who will supervise and monitor the child's progress in the home.

13. The relative affirms that one of the following relationships exist between the child and the relative by blood, marriage, or adoption. Please circle one: brother, sister, step-brother, step-sister, grandfather, grandmother, uncle, aunt, nephew, niece, great-grandfather, great-grandmother, great-uncle, great-aunt, first cousin, and spouses of any of the above.

14. The relative understands that he or she has a right to receive Department payments to assist with the care of the child, but that other income for the child may be deducted from the DCFS payment.

15. To contact the Department call: _____

Emergency Number for Evenings/Weekends _____

| | |
|---|---|
| DCFS Worker | Relative — Woman |
| Unit | Relative — Man |
| Telephone | Address |
| Date | Telephone |

NOTICE—Completion of this form is required in order for this agency to carry out its obligations under Illinois Revised Statutes, Ch. 23, Par. 5006a. This form approved by Forms Management Center.

DOCKETED

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

1976 DEC 10 PM 4 26

CLERK, U.S. DISTRICT COURT

MARCEL YOUAKIM, et al.,

Plaintiffs,

v. No. 73 C 635

JEROME MILLER, et al.,

Defendants.

NOTICE OF FILING

TO: ROBERT LEHRER
Legal Assistance Foundation
343 South Dearborn Street
Chicago, Illinois

PLEASE TAKE NOTICE that on the 10th day of December, 1976, the attached DEFENDANTS' MEMORANDUM IN OPPOSITION TO FURTHER AMENDMENT OF REGULATION 5.12 was filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division at the United States Courthouse, 219 South Dearborn Street, Chicago, Illinois.

WILLIAM J. SCOTT
Attorney General of Illinois
160 North LaSalle Street
Chicago, Illinois 60601

RICHARD L. RYAN
Special Assistant Attorney General
(Of Counsel)
[illegible]

CERTIFICATE OF SERVICE

The undersigned being first duly sworn on oath deposes and says that a copy of the foregoing was served upon the above named at the above address by depositing the same in the United States Mail Chute located at 160 North LaSalle Street, Chicago, Illinois, on December 10, 1976.

SUBSCRIBED and SWORN to before me this 10th day

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| MARCEL YOUAKIM, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | No. 73 C 635 |
| | ) | |
| JEROME MILLER, et al., | ) | |
| | ) | |
| Defendants. | ) | |

DEFENDANTS' MEMORANDUM IN OPPOSITION
TO FURTHER AMENDMENT OF REGULATION 5.12

On November 10, 1976, Defendants filed with this Court for its approval, amended policies and procedures to implement the Court's August 24, 1976 Order. These amended policies and procedures served upon Plaintiff's counsel in written form between 4:00 and 5:00 p.m , on November 9, 1976, were read to said counsel over the telephone in toto in the morning of that date. At that time counsel for Plaintiffs indicated that he thought Regulation 5.12 might be worded differently but stated that "it was no big thing" and Defendants would not be taken to task.

At the Court hearing of November 10, 1976, the "First Amended Interim Report to the Court" which inter alia contained the Amended Regulation 5.12 as read, was approved without comment by counsel for

plaintiffs and by the Court, and an order was entered to that effect.

On November 15, 1976, after the brief for Defendants-Appellants in this matter was filed in the Seventh Circuit Court of Appeals (November 11, 1976), Counsel for Plaintiffs, by phone inquired as to whether Regulation 5.12 might be changed voluntarily. If such was not the case it would have to be "forced" through the court.

Notwithstanding assertions to the contrary, it has never been represented to such counsel by the attorney for Defendants or anyone else, that the intent of such paragraph was to provide that all "foster homes", related and unrelated alike, be subject to identical licensing standards, only to be given a different label. Such a statement would be totally unconsistent with the position Defendants have taken with regard to this litigation from the onset. Indeed, as stated in the oral argument of January 25, 1974, before the three-judge panel considering this case, counsel for Defendants said:

> "In the case of relatives, the State in its wisdom regards "foster care" on the part of relatives to be of a much more personal nature, and in its desire to secure family unity excludes relatives from the requirements of obtaining a license before placement is made with them."

[illegible]

[illegible]

The consistent and unwavering position of the Defendants has been that relative caretakers [illegible]

as inclusive within the state and federal definitions of "foster care", and are consequently not covered within the ambit of 42 U.S.C. §608. This is the sole question presently being litigated on appeal to the Seventh Circuit.

Plaintiffs counsel on the other hand raises an issue concerning the interpretation of §608(f) as it relates to licensing or approval standards. (i.e. whether related and non-related "foster parents" are subject to the same standards). This matter has never been presented to or addressed by any court and is not a proper issue for discussion here, particularly as it is brought subsequent to the filing of an appeal which has finalized the points of consideration on review. As such the question presented should not be litigated within the parameters of this instant suit, and is properly the basis for separate legal consideration in another case.

In addition to and notwithstanding the above, the stated question and the amendment sought by counsel is directly based upon a premise (i.e. inclusion of "relatives" under §608) which is currently being considered by the appellate court, and is not yet finalized. For such reason, Defendants should not be subjected to taking a position and discussing a new issue which calls for additional research until the original premise becomes dispositive.

Lastly, since relative caretakers have never been the subject of licensing standards, the effect of their counsel's insistence on amendment would be to the ultimate detriment of the entire class. The rigid rules of thorough medical examinations, pet inoculation,

separation of bedrooms, mandatory space requirements and a host of other prerequisites to licensing would befall the Plaintiffs where they had not done so before. The direct consequence of failing these standards would be the mandatory removal of the related children from the home to their injury which accomplishes the opposite of the goals required by this Court and the federal government.

WHEREFORE it is respectfully requested that Plaintiffs "suggestions for amendments" be denied.

Respectfully submitted,

WILLIAM J. SCOTT
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Chicago, Illinois 60601

RICHARD L. RYAN
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(Of Counsel)
793-3587